91-1241

No.

Supreme Court, U.S.
FILED
JAN 30 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN E. SHIMOTA and NAN B. SHIMOTA,
Petitioners,

v.

THE UNITED STATES,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower court * improperly determined that a 1966 Treasury regulation, 26 C.F.R. § 1.72-2(a)(3)(i), governing the tax treatment of certain distributions from an annuity program, supercedes a subsequent statutory enactment, 5 U.S.C. § 8343a, authorizing a distribution defined as a return of capital by 5 U.S.C. § 8331(8)?

2. Whether the lower court's reliance on the single contract doctrine of 26 C.F.R. § 1.72-2(a)(3)(i) and its failure to consider the impact of the subsequently enacted separate contract doctrine of 26 U.S.C. § 72(d) and § 414(k) requires remand of this case for consideration of these later statutes? **

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* Any references in this Petition to the "lower court" refer to the decision of the United States Claims Court as summarily affirmed by the United States Court of Appeals. The Court of Appeals decision is included at Appendix A and the Claims Court decision is included at Appendix B.

** The single contract doctrine is set forth in 26 C.F.R. § 1.72-2(a)(3)(i). Under this doctrine each separate annuity program of an employer is considered a single contract. The separate contract doctrine originates in 26 U.S.C. §§ 72(d) and 414(k). It requires employee contributions to an annuity program to be treated as a separate contract. To the extent distributions from a separate contract represent a refund of employee contributions, they are nontaxable.

PARTIES

The names of all parties to the proceedings are set forth in the caption.***

*** The parties identified in the caption are the only formal parties to the proceedings. The Office of Personnel Management has informally advised counsel for petitioners, however, that approximately 268,000 federal retirees received a distribution similar to the one at issue in this case. Thus, any opinion issued by this Court could have a direct impact on the tax liability of each federal retiree who received the lump-sum credit distribution.

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OPINIONS BELOW

Shimota v. United States, 943 F.2d 1312 (Fed. Cir. 1991) (set forth in Appendix A).

Shimota v. United States, 21 Cl. Ct. 510 (1990) (set forth in Appendix B).

JURISDICTION

The decision of the United States Court of Appeals for the Federal Circuit was entered on September 12, 1991. (*See* Appendix A.) The Court of Appeals denied a timely Petition for Rehearing on November 6, 1991. (*See* Appendix C.) The Court of Appeals subsequently declined a timely Suggestion for Rehearing In Banc on November 20, 1991. (*See* Appendix D.) Petitioners invoke jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutes are 5 U.S.C. §§ 8331(8) and 8343a, and 26 U.S.C. §§ 72(d), 72(e)(5)(E) and 414(k). The relevant regulation is 26 C.F.R. § 1.72-2(a)(3)(i). Each of these provisions is set forth in Appendix E.

STATEMENT OF THE CASE

Petitioner, John E. Shimota, was an agent of the Federal Bureau of Investigation ("FBI") for more than twenty years prior to his retirement in November, 1986.[1] While employed by the FBI, he contributed $53,382.77 in after-tax funds to the Civil Service Retirement System ("CSRS").[2] Following his retirement, Mr. Shimota elected to receive a lump-sum credit distribution and a reduced annuity pursuant to 5 U.S.C. § 8343a (Supp. 1991). The lump-sum credit is defined as a refund of an employee's contributions to the CSRS by 5 U.S.C. § 8331(8) (1980 & Supp. 1991).[3]

The amount of Mr. Shimota's lump-sum credit equaled the exact amount of his after-tax contributions to the CSRS—$53,382.77. In correspondence to Mr. Shimota the Office of Personnel Management ("OPM") characterized the lump-sum credit as a refund of his contribu-

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[1] Petitioners John E. Shimota and Nan B. Shimota are husband and wife who filed a joint income tax return for 1987. The dispositive issues in this case concern Mr. Shimota's retirement contributions to the CSRS. Throughout this Petition, counsel use the terms "petitioner" and "petitioners" interchangeably.

[2] The Civil Service Retirement System is a statutorily mandated retirement program for employees of the federal government. It is codified at 5 U.S.C. Chapter 83 (1980 & Supp. 1991). The CSRS is administered by the Office of Personnel Management and the regulations governing it are published at 5 C.F.R. § 831 (1987).

[3] The lump-sum credit is also defined to include certain deposits by an employee as well as interest on pre-1957 contributions to the CSRS. The lump-sum credit paid to Mr. Shimota, however, consisted solely of a refund of his contributions.

tions to the CSRS. When Mr. Shimota received his lump-sum credit distribution in 1987, he filed an application for a private letter ruling with the Internal Revenue Service ("IRS"). He requested the IRS to advise him of the proper tax treatment of this distribution. In a letter dated December 4, 1987, the IRS characterized the lump-sum credit as "an amount equal to" his contributions to the CSRS, but not a refund of those contributions. The IRS determined that 5.9 percent of the lump-sum credit was a non-taxable return of Mr. Shimota's contributions and that the remaining 94.1 percent of this distribution was taxable.

Petitioners filed a joint 1987 federal income tax return and reported the lump-sum credit distribution in accordance with the guidance provided by the IRS. They filed a timely administrative claim for refund of the federal income taxes imposed on the lump-sum credit with the IRS in June, 1988. When the IRS denied this claim in a letter dated September 19, 1988, the Shimotas initiated this case by filing a timely complaint in the United States Claims Court. The Claims Court had jurisdiction of this matter pursuant to 28 U.S.C. § 1491.

The Claims Court upheld the IRS's position. It reasoned that the statutory definition of "lump-sum credit" under the CSRS was not controlling for tax purposes. Instead, the Claims Court concluded, the CSRS was governed by the general annuity provisions of § 72 of the Internal Revenue Code, contained in 26 U.S.C. § 72 (1988 & Supp. 1991). It rejected the taxpayers' argument that the lump-sum credit and the reduced annuity authorized by the CSRS at 5 U.S.C. § 8343a were separate elements or contracts.[4] Rather, the Claims Court

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[4] Both in the Claims Court and on appeal, petitioners argued that the CSRS was not a contract. The Claims Court held, however, that for tax purposes, the CSRS is treated as a contract even though it is not a contract. All references to a contract in this petition are for purposes of consistency with the conclusion of the lower court.

concluded that the lump-sum credit and the monthly annuity were from a single contract in reliance on 26 C.F.R. § 1.72-2(a)(3)(i) (1991). Accordingly, the Claims Court held that the lump-sum credit payment was properly prorated between a 5.9% return of employee contributions and a 94.1% payment of previously untaxed government contributions. In reaching this conclusion, the Claims Court did not mention the separate contract doctrine added to the Tax Code by the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) ("The Tax Reform Act of 1986") and the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (1988) ("TAMRA").

Petitioners filed a timely Notice of Appeal to the United States Court of Appeals for the Federal Circuit ("the Court of Appeals") invoking jurisdiction under 28 U.S.C. § 1295(a)(3). The Court of Appeals issued an order on September 12, 1991, summarily affirming the order of the Claims Court. Petitioners filed a timely Petition for Rehearing with the Court of Appeals on September 25, 1991. The Petition for Rehearing was denied by order of the Court of Appeals dated November 6, 1991.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The issues in this case potentially affect approximately 268,000 retired federal employees and involve two federal statutes, the CSRS, codified at 5 U.S.C. Chapter 83, and the Internal Revenue Code, codified at Title 26, United States Code (the "Tax Code.")[5] When a court is called

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[5] The lump-sum credit option was available for persons who retired after June 6, 1986, and before December 1, 1990. The availability of this option was suspended for a period of five years by the Omnibus Budget Reconciliation Act of 1990, 5 U.S.C. § 8343a (f)(1) (Supp. 1991). The OPM has informally advised petitioners' counsel that approximately 268,000 federal retirees elected this option while it was available.

upon to interpret two statutes it must, to the extent possible, strive to interpret these statutes to give effect to the provisions of both. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). In prior cases involving tax issues arising under the CSRS, the courts have followed this approach. They have looked to the CSRS to determine the proper characterization of the matter before the court and to the Tax Code to determine the proper tax treatment. *Hogan v. United States*, 513 F.2d 170 (6th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975); *Cohen v. Commissioner*, 63 T.C. 267 (1974), *aff'd*, 543 F.2d 725 (9th Cir. 1976).

The lower court did not follow this approach. Rather, it concluded that the CSRS definition of the lump-sum credit as a return of capital was not controlling for tax purposes. The lower court also held that, pursuant to 26 C.F.R. § 1.72-2(a)(3)(i), all distributions from the CSRS should be treated as if they were from a single contract. This regulation has not been revised since 1966 and does not reflect the dramatic changes in the tax treatment of annuity distributions enacted as part of the Tax Reform Act of 1986 and TAMRA. Specifically, the regulation does not reflect the separate contract doctrine first enacted in 1986 and now embodied in §§ 72(d) and 414(k) of the Tax Code.

The very clear statutory provisions of both the CSRS (5 U.S.C. §§ 8343a and 8331(8)) and the Tax Code (26 U.S.C. §§ 72(d) and 414(k)) establish that the distribution to Mr. Shimota was not taxable. The legislative history of these provisions confirms that these statutory provisions were related. When Congress enacted these provisions in 1986, its intention was to allow federal retirees to receive a tax free recovery of their contributions to the CSRS.

ARGUMENT

I. CONGRESS HAS EXPRESSLY PROVIDED THAT THE LUMP-SUM PAYMENT TO APPELLANT WAS A RETURN OF HIS PREVIOUSLY TAXED CONTRIBUTIONS TO THE CSRS.

The Claims Court held that the lump-sum payment elected by John Shimota was taxable based upon an application of § 72 of the Tax Code, which governs annuities and pensions. Treatment of the lump-sum payment as taxable income under Code § 72 is flatly inconsistent with the statute that authorized this payment in the first place. That statute, the CSRS, specifically defines the lump-sum payment as a return of previously taxed employee contributions into the CSRS, thereby precluding the IRS from characterizing it as a taxable retirement benefit. 5 U.S.C. § 8331 *et seq.*

Under the CSRS, a retiring employee has a right to an annuity, calculated as a fixed percentage of average pay. 5 U.S.C. § 8339 (Supp. 1991). The lump-sum payment at issue here was authorized by 5 U.S.C. § 8343a, enacted by Congress in 1986. That provision offers a retiring employee the alternative of receiving "the lump-sum credit" and a reduced annuity. 5 U.S.C. § 8343a(b).[6] The lump-sum credit, in turn, is statutorily defined as "the unrefunded amount consisting of . . . retirement deductions made from the basic pay of an employee." 5 U.S.C. § 8331(8) (1980 & Supp. 1991).[7] In short, the payment

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[6] The reduced annuity must have a present value equal to the present value of the annuity that the employee would otherwise receive, minus the lump-sum credit. 5 U.S.C. § 8343a(c) (Supp. 1991).

[7] The credit may also include amounts deposited to the CSRS by an employee and interest credited to amounts contributed to or deposited by an employee in the CSRS before December 31, 1956. 5 U.S.C. § 8331(8)(B) and (C). To the extent that a particular employee's lump-sum payment included such interest—which is not the case here—that portion would be taxable because, unlike re-

does not simply amount to—but actually consists of—money that the employee had previously paid into the fund from after-tax dollars.

The lump-sum credit existed in the CSRS long before 1986.[8] Under 5 U.S.C. § 8342, an employee who leaves government service before his right to an annuity accrues has the option of receiving the lump-sum credit—*i.e.*, all of his payments into the fund—in return for relinquishment of any right to a later annuity. 5 U.S.C. § 8342 (1980 & Supp. 1991). There is no dispute that this payment is not taxable. (Appendix B at 27a n.30) 26 U.S.C. § 72(e)(5)(E) (1988 & Supp. 1991). In 1986, Congress simply mandated that a retiring employee had the option of receiving precisely the same refund of his payments upon separation from the government, coupled with a concomitant reduction in later annuity payments that he would otherwise have received. 5 U.S.C. § 8343a(c).

When Congress passes a specific statute governing a particular event that appears to be in conflict with a preexisting general statutory provision, a court's first obligation is to attempt to reconcile the two. *See, e.g., Stewart v. Smith*, 673 F.2d 485, 492 (D.C. Cir. 1982) ["When faced with apparently conflicting statutes, our first task is to examine their language to determine whether they may be reconciled." (citing *United States v. Will*, 449 U.S. 200 (1980)]. *See also Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1018 and *Morton v. Mancari*, 417 U.S. at 551. In the present matter, such a reconcilation is possible, since Code § 72 itself is properly read as not requiring taxation of the lump-sum credit. See pp. 9 through 13,

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funded deductions and deposits, interest does not represent money that has already been taxed.

[8] The present definition of the lump-sum credit first appeared in the CSRS in 1966 with the passage of the Government Organization and Employees Act of 1966, Pub. L. No. 89-554, 80 Stat. 378 (1966). Prior to the passage of 5 U.S.C. § 8343a, the IRS had ruled that the lump sum credit was a nontaxable refund of an employee's contributions to the CSRS. Rev. Rul. 70-150, 1970-1 C.B. 106.

infra. If the two statutes were irreconcilable, however, § 8343a—the more recent and more specific provision—would take precedence over an earlier general law. *See, e.g., Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). There is no reason why this settled principle should be any less applicable in tax cases than in all others.

The lower court's only answer to this straightforward analysis was to misread § 8343a as providing that the lump-sum credit was simply one part of a single "annuity" payable to petitioner and thus taxable in accordance with the general provisions of Code § 72.[9] (Appendix B at 27a-28a) The court relied on the fact that § 8343a requires "alternative forms of annuities" and then provides that one "alternative" should be "(A) payment of the lump-sum credit . . . *and* (B) payment of [a reduced] annuity . . ." 5 U.S.C. § 8343a(b)(1) (Supp. 1991) (emphasis supplied). The court then reasoned that this statutory phrasing implies that the lump-sum credit is, itself, part of a larger "annuity." (Appendix B at 27a-28a) In fact, however, no such implication can fairly be drawn from the statute. On the contrary, the statute expressly states that the "alternative" would consist of the "lump-sum credit" and a *separate* annuity. *Id.*

More importantly, under any theory, it is clear that the first phase of the "alternative" made available to employees was payment of the "lump-sum credit," which is expressly defined as a return of employee contributions. 5 U.S.C. § 8331(8). If Congress had intended merely to authorize an early, taxable annuity payment of funds equal in amount to those previously contributed by the employee, it could easily have done so. It chose instead to incorporate a particular statutory phrase—the "lump-sum credit"—which is defined as consisting of a return of

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[9] All references to "Code" refer to the Internal Revenue Code of 1986, Title 26, United States Code, unless otherwise specifically indicated.

contributions and which had previously been nontaxable when paid under § 8342.

II. THE LOWER COURT'S RELIANCE ON THE SINGLE CONTRACT DOCTRINE OF THE TREASURY REGULATIONS IGNORES THE SIGNIFICANCE OF THE SUBSEQUENT STATUTORY SEPARATE CONTRACT DOCTRINE.

Although the relevant provisions of both the CSRS and the Tax Code may be reconciled simply by comparing the clear language of these statutes, the lower court did not attempt any such reconciliation. Rather, it relied on the single contract doctrine of 26 C.F.R. § 1.72-2(a)(3)(i)(1991). This regulation has not been amended since 1966 and does not reflect either the 1986 or 1988 changes to the CSRS and the Tax Code resulting in the adoption of a separate contract doctrine. The lump-sum distribution provided for in 5 U.S.C. § 8343a is exempt from taxation under the separate contract doctrine of § 72(d) of the Tax Code.

Section 72(d)[10] of the Tax Code allows payments made pursuant to certain kinds of pension programs to be treated as if they were derived from two separate plans rather than from a single integrated one. The CSRS satisfies the criteria for treatment under Code § 72(d). As a result, the payment to Mr. Shimota must be regarded as a nontaxable return of *his* contributions, rather than a payment based on both his contributions and those of his employer, as the lower court concluded.

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[10] While the Claims Court does cite Code § 72(d), it refers to the pre-1986 version. Prior to the passage of the Tax Reform Act of 1986, Code § 72(d) was referred to as "the basis recovery rule" or "the three-year recovery rule." Under this provision, annuity recipients were not taxed on any annuity distributions until they fully recovered all of their contributions. Thereafter, all payments to them were fully taxable. This provision was repealed by the Tax Reform Act of 1986 and replaced by the separate contract doctrine of the new Code § 72(d). The lower court did not address the significance of this provision.

The lower court concluded that Code § 72 governs distributions under the CSRS, but nonetheless failed to apply subsection (d) of that section. Subsection (d) provides that, "[f]or purposes of this section [*i.e.*, Code § 72] employee contributions (and any income allocable thereto) under a defined contribution plan may be treated as a separate contract." [11] The effect of this rule is to permit an employee to divide his benefits under certain kinds of pension plans so that, for tax purposes, he can treat his payments as having, in effect, come from two distinct plans. In a plan where the employee has contributed after-tax dollars, this rule may provide a tax benefit if the plan provides for early distribution of benefits attributable to those contributions.

Application of the separate contract rule to Mr. Shimota would render his lump-sum payment a nontaxable return of his own contributions pursuant to 26 U.S.C. § 72(e)(5)(E). The only real dispute is whether the CSRS is a "defined contribution plan," which is a requirement for treatment under Code § 72(d). The answer to that question is contained in Code § 414(k).

Code § 414(k) expressly provides that certain "defined benefit plans" must be treated, in part, as defined contribution plans for purposes of Code § 72(d). In relevant part, Code § 414(k) states:

> A defined benefit plan which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant shall . . .
>
> (2) for purposes of section 72(d) [and other sections] be treated as consisting of a defined contribu-

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[11] Subsection (d) was added to Code § 72 as part of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342. As part of the same statute, Congress also eliminated Code § 72(e)(9), which had contained essentially the same language and which had been added as part of the Tax Reform Act of 1986. Code § 72(d) was made effective as of the date of the 1986 Act.

> tion plan to the extent benefits are based on the separate account of a participant and as a defined benefit plan with respect to the remaining benefits under the plan, . . . [12]

26 U.S.C. § 414(k) (1988 & Supp. 1991).

The CSRS satisfies the requisite criteria for the application of this section.

The CSRS benefit is ultimately derived from employer contributions. The overall annuity amount is fixed regardless of the amount of employee contributions. 5 U.S.C. § 8334. At the same time, at least under the "lump-sum credit" alternative of § 8343a(b)(1), the benefit is based partly on the balance of employee contributions, since that balance controls the amount of the lump-sum payment. Consequently, under the plain language of Code § 414(k), the CSRS "*shall . . . for purposes of section 72(d)* . . . be treated as consisting of a defined contribution plan to the extent benefits are based on the separate account of a participant." 26 U.S.C. § 414(k) (emphasis supplied).

The application of Code § 72(d)'s separate contract rule to this case is straightforward.[13] The separate contract here in question involves "[federal] employee con-

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[12] Code § 414(k) was amended to add the express reference to Code § 72(d) as part of the Technical and Miscellaneous Revenue Act of 1986, Pub. L. No. 100-647, 102 Stat. 3342. This provision, like Code § 72(d) itself, was made effective as of the date of passage of the Tax Reform Act of 1986.

[13] Under Code § 72(d), as the language suggests, either "[a] plan [itself] may designate the contract from which a distribution is made . . . [or] a participant can be permitted to designate the contract from which a distribution is made." Staff of the Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1986 at 724. In this case, of course, the CSRS designates the lump-sum payment as coming from the employee's account, a view echoed by OPM—the plan administrator. 5 C.F.R. §§ 831.2202 and 831.2204(a).

tributions (and any income allocable thereto)." The lump-sum credit received by Mr. Shimota, in turn, is defined to be coextensive with the scope of that separate contract—*i.e.*, to equal the *employee's* contributions and allocable interest where appropriate. 5 U.S.C. §§ 8343a(b) and 8331(8)(A). In particular, for employees such as petitioner whose contributions began after 1956, the CSRS provides at 5 U.S.C. § 8331(8)[14] that no income is allocable to these contributions. *Id.* Thus, the full amount of the payment is a return of the employee's contributions. Since those contributions were all made with after-tax dollars, the lump-sum payment to petitioner is completely nontaxable.

The lower court's response to this separate contract argument is misconceived. The court relied solely on a Treasury regulation, 26 C.F.R. § 1.72-2(a)(3)(i), which provides that "each separate program of the employer consisting of interrelated contributions and benefits shall be considered a single contract." By its terms, this regulation is inapplicable: it addresses *separate* (but interrelated) programs, while the CSRS is a single program. In any event, the regulation *predates* the 1986 changes to the Tax Code (and the subsequent technical amendments implementing those changes). The subsequent addition of the separate contract rule of Code § 72(d) plainly modified the single contract theory of the earlier regulation.

The respondent offers a different response to this separate contract theory, arguing that the CSRS is not even in part a defined contribution plan under Code § 414(k) and, therefore, that Code § 72(d) is inapplicable.[15] In the proceedings below, the respondent cited

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[14] The IRS confirmed this understanding in its Dec. 4, 1987, letter ruling to petitioner, stating that "[n]o interest was accrued on [your] contributions."

[15] Although both petitioner and respondent briefed their respective positions in the lower court, the court did not address the significance of the separate contract rationale.

only an informal IRS publication as authority for its assertion that employee contributions to the CSRS are not maintained "under a separate account to *which actual earnings and losses are allocated.*" IRS Notice 87-13, 1987-1 C.B. 432, 438 (Q & A 14) (emphasis supplied). These underscored words are not contained in the statute. Rather, they have simply been added by the respondent without even the benefit of the formal regulatory process, but rather by the expedient use of a highly informal "Q & A." Congress's words cannot be so lightly disregarded.[16]

As the respondent's position suggests, if Code § 72(d) is applied according to *its* terms, then contributions under the CSRS clearly amount to a separate contract under that provision. Indeed, 5 U.S.C. § 8334(f) provides that amounts from an employee's salary "*shall* be entered on individual retirement records." 5 U.S.C. § 8334(f) (Supp. 1991) (Emphasis added). The lower court's failure to even address the applicability of Code §§ 72(d) and 414(k) to the issues in this case requires remand for consideration of this issue.

III. THE LEGISLATIVE HISTORY OF THE 1986 CHANGES TO THE CSRS AND THE TAX CODE CONFIRMS THAT THE LUMP-SUM DISTRIBUTION AND THE SEPARATE CONTRACT DOCTRINE ARE RELATED AND THAT THE PAYMENT TO THE PETITIONER IS TAX FREE.

Prior to 1986 the only retirement benefit payable to retiring federal employees under the CSRS was in the form of an annuity. The tax consequences of this annuity were determined under the basis recovery rule

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[16] The Courts have held that such informal guidance is merely the position of one of the parties to the litigation which is not entitled to be accorded any significance as precedent. *Dixon v. United States*, 381 U.S. 68, 74 (1965), *Eller v. Commissioner*, 77 T.C. 934, 946 (1981).

of prior Code § 72(d).[17] The Tax Reform Act of 1986 repealed the basis recovery rule of the former Code § 72(d) and in its place enacted a separate contract rule in a new Code § 72(d) and in an amended Code § 414(k).[18] The CSRS was also amended in 1986 by adding 5 U.S.C. § 8343a which directed the Office of Personnel Management ("OPM") to offer a lump sum credit distribution to retiring federal employees in addition to an annuity.[19] These provisions and their legislative history were not addressed in either the Claims Court opinion or the summary affirmance by the Court of Appeals.

The repeal of the basis recovery rule of prior Code § 72(d) and the enactment of the separate contract rule of the new Code § 72(d) were directly related. The rationale for enactment of the separate contract doctrine of the present Code § 72(d) was explained as follows:

> Under the Act, employee contributions to a defined contribution plan or a separate account of a defined benefit plan (and the income attributable thereto)

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[17] This reference to Code § 72(d) refers to a now-repealed provision of the Internal Revenue Code of 1954, as amended. When mentioned in this Petition, this repealed provision is referred to as the prior or former Code § 72(d). Prior Code § 72(d) was commonly referred to as "the basis recovery rule" or "the three-year recovery rule." *See* footnote 10, *supra*.

[18] The Staff of The Joint Committee On Taxation acknowledged in footnotes 24 and 25 of General Explanation of the Tax Reform Act of 1986 that a technical correction may be necessary to implement the intent of Congress regarding the separate contract treatment. *See* Staff of The Joint Committee on Taxation General Explanation of the Tax Reform Act of 1986 at 724. This technical correction was made in TAMRA by adding a new Code § 72(d) and by amending Code § 414(k). Both of these provisions were made effective as of the date of passage of the Tax Reform Act of 1986. See TAMRA §§ 1011A(b)(b) and 1011A(b)(3).

[19] This amendment to the CSRS was made as part of the Federal Employee Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (1986) ("the FERS Act").

> may be treated as a separate contract for purposes of section 72.
>
> Thus, under the Act, if an employee withdraws amounts from such a separate contract either before or after the employee's annuity starting date, then for tax purposes, the distribution will be considered to be part nontaxable, *i.e.*, a return of employee contributions, and part taxable, *i.e.*, a distribution of earnings on those contributions.

STAFF OF THE JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 at 724. ("The Joint Committee Report").[20]

The separate contract rationale was incorporated as new Code § 72(d) and amended Code § 414(k) as part of TAMRA; however, it was effective as of the date of passage of the Tax Reform Act of 1986. These statutes changed the single contract rationale in 26 C.F.R. § 1.72-2 (a)(3)(i). Accordingly, this regulation no longer applies in those situations governed by Code §§ 72(d) and 414(k) and the lower court's reliance on this regulation is incorrect.

The CSRS was also amended in 1986 to provide retiring federal employees the right to elect a lump-sum credit. This amendment was incorporated into the CSRS by adding 5 U.S.C. § 8343a. The lump-sum credit was authorized in direct response to the repeal of the basis recovery rule of prior Code § 72(d). The House Post Office and Civil Service Committee explained that:

> [L]ump sum withdrawal of Federal employee contributions at the time of retirement was designed to alleviate a portion of the burden retroactively

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[20] This explanation is a restatement of the Conference Committee's explanation of the separate contract rationale in the Conference Report which accompanied the Tax Reform Act of 1986. *See* CONF. REP. No. 841, 99th Cong., 2d Sess. II—462. This Court has also relied upon the Joint Committee Report in interpreting tax statutes. *Federal Power Commission v. Memphis Light, Gas and Water Division*, 411 U.S. 458, 471 (1973).

> imposed on Federal retirees by the repeal of the 'three-year recovery rule' in the Tax Reform Act of 1986 (PL 99-514). In formulating the lump-sum option, Congress intended that retirees would be permitted to receive a return of previously taxed employee contributions and a reduced annuity.

H.R. REP. No. 881, 101st Cong., 2d Sess. (1990) at 170.[21]

The relationship of the 1986 changes to the Tax Code and the 1986 changes to the CSRS is also illustrated by comments made at the time the Tax Reform Act of 1986 was passed. Congressman Rostenkowski, the Chairman of the House Ways and Means Committee, explained certain understandings he had reached with Congressman Ford, the Chairman of the House Post Office and Civil Service Committee,[22] regarding the relationship of the 1986 changes to the Tax Code and to the CSRS. He stated that:

> the employee receives a refund of excess contributions paid onto (sic) the Civil Service Retirement System, [and] *the refunded contributions are also*

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[21] The quoted language was taken from the legislative history of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990). This Court has stated that a congressional committee's statement made within five years of passage of a prior statute which originated in that committee is virtually conclusive as to the significance of the prior act. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 329-330 (1942). *See also Seatrain Shipbuilding Corporation v. Shell Oil Company*, 444 U.S. 572, 596 (1980).

[22] The House Ways and Means Committee had primary responsibility in the House for consideration of the Tax Reform Act of 1986. The House Post Office and Civil Service Committee had primary responsibility in the House for consideration of the FERS Act which added the lump sum option of 5 U.S.C. § 8343a. Congressman Rostenkowski was also a member of the Joint House Senate Conference Committee which recommended repeal of the basis recovery rule of prior Code § 72(d) and enactment of the separate contract rules of the new Code §§ 72(d) and 414(k).

> *treated as part of a separate contract* and, therefore, are treated as a nontaxable return of employee contributions. (Emphasis supplied)

CONG. REC. H8356 (daily ed. Sept. 25, 1986) (statement of Rep. Rostenkowski).[23]

In view of the foregoing, the legislative history of § 72(d) of the Tax Code and § 8343a of the CSRS confirms the clear meaning of these statutes. Specifically, the repeal of the basis recovery rule, enactment of the separate contract rule and authorization of the lump-sum credit distribution were interrelated. These statutory provisions were designed to ensure that federal retirees had the option of electing to receive a nontaxable refund of their own previously taxed contributions to the CSRS.

CONCLUSION

The lower court's failure to analyze the relationship between the CSRS and the Tax Code and to implement the clear language of these statutes is inconsistent with fundamental principles of statutory construction. Moreover, the lower court's failure to address the statutory revision of the regulation it relied upon as the basis for its opinion constitutes clear error.

Petitioners urge the Court to accept this case for review and to reverse the lower court's holding because of its failure to interpret the CSRS and the Tax Code in such a manner as to give effect to the relevant provisions of both. Alternatively, petitioners respectfully request the Court to remand this matter to the lower court and direct it to consider the relationship of Code §§ 72(d) and 414(k) to the issues in this case.

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[23] While Congressman Rostenkowski's comments did not relate to the lump-sum credit, they do indicate that employee contributions to the CSRS are maintained in a separate account and are tax free when refunded.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted this 30th day of January, 1992.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-5017

JOHN E. SHIMOTA and NAN B. SHIMOTA,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

DECIDED: September 12, 1991

Before ARCHER, *Circuit Judge*, COWEN, *Senior Circuit Judge*, and MAYER, *Circuit Judge*.

ARCHER, *Circuit Judge*.

John E. Shimota and Nan B. Shimota (Shimota) appeal the judgment of the United States Claims Court, *Shimota v. United States*, 21 Cl. Ct. 510 (1990), holding that the lump-sum payment received by Mr. Shimota from the Civil Service Retirement System (CSRS) after commencement of his CSRS retirement annuity was includible in income and subject to federal income taxation under section 72 of the Internal Revenue Code of 1986 (26 U.S.C. § 72), and that the 10 percent additional tax under section 72(t) was properly imposed on that payment. We affirm.

The arguments presented by Shimota in this appeal were fully considered and the issues correctly decided in Judge Robinson's thorough and well-reasoned opinion. Accordingly, we adopt that opinion and affirm the Claims Court's judgment. *See also Guilzon v. Commissioner*, 97 T.C. 14 (1991).

AFFIRMED

APPENDIX B

IN THE UNITED STATES CLAIMS COURT

No. 106-89T

September 10, 1990

JOHN E. SHIMOTA and NAN B. SHIMOTA,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

Tax; Summary judgment; Application of IRC §§ 401(a), 402(b), 501(a), 72(e) and 72(t); Taxation of CSRS lump-sum distribution under 5 U.S.C. § 8343a as annuity contract.

Thomas J. O'Rourke, with whom was *Virginia J. Townsend* and *G. Jerry Shaw,* Washington, D.C., for defendant.

Kenneth C. Gobetz with whom was *Gerald B. Leedom* and *Assistant Attorney General Shirley D. Peterson,* Washington, D.C., for defendant.

OPINION

ROBINSON, *Judge.*

This case is before the court on the parties' cross-motions for summary judgment. John E. Shimota and Nan B. Shimota (plaintiffs) seek a tax refund in the amount of $17,784.30 for tax year 1987. The issue presented in the case is whether the lump-sum distribution which John E. Shimota (plaintiff) elected under 5 U.S.C. § 8343a to receive from the Civil Service Retirement and

Disability Fund (the Fund)[1] is "an amount received under an annuity contract" and "not received as an annuity" and is therefore taxable under § 72(e) of the Internal Revenue Code (IRC) of 1986 or whether it is a tax free return of capital. If the lump-sum distribution is taxable under § 72(e), the issue is then whether plaintiffs are liable for the penalty under § 72(t) of the IRC. For the following reasons, the court will hold that the lump-sum distribution is taxable as an annuity contract under § 72(e) and that the 10 percent additional tax provision of § 72(t) applies. Therefore, the court will deny plaintiffs' motion for summary judgment and will grant defendant's cross-motion for summary judgment on both issues.

Factual Background

Plaintiffs are husband and wife who filed joint tax returns in 1987 and 1988 in accordance with instructions they received from the Internal Revenue Service (IRS) in two December 4, 1987 letters.[2] Plaintiff was a law enforcement officer for the Federal Bureau of Investigation (FBI) from June 24, 1963, until his retirement on November 26, 1986.[3] While employed with the FBI, he par-

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[1] The Fund consists of contributions made by federal employees and Government agencies, together with earnings on these amounts. The Fund is an Independent Trust. 31 U.S.C. § 1321(88). Employing agencies deduct a specified amount from each employee's salary and contribute an equal amount. 5 U.S.C. § 8334(a)(1); 5 C.F.R. § 831.111.

[2] The parties stipulated to the pertinent facts in a document filed October 13, 1989. RUSCC 56(d)(3). This factual background relies primarily upon the stipulated facts.

[3] In addition, Mr. Shimota served in the U.S. Navy from January 1, 1957 through June 3, 1959, and the U.S. Marine Corps from June 3, 1959 through May 29, 1963. Plaintiff elected to deposit a total of $1,297.34 to the CSRS in order to receive retirement credit under the CSRS for his military service. This deposit was contributed through withholding from his salary from October 15, 1983 through September 29, 1984.

ticipated in the Civil Service Retirement System (CSRS). Federal employees hired prior to January 1, 1984 participate in the CSRS and are required to contribute part of their salary to the CSRS. 5 U.S.C. § 8334. Under this system, plaintiff's mandatory contributions were withheld from his gross salary. His total contributions to the CSRS were $53,382.77.

The amounts withheld from plaintiff's salary were taxed in the years in which the deductions were made. *See Hogan v. United States*, 513 F.2d 170, 175 (6th Cir. 1975). However, the amounts the FBI contributed and the interest earned on plaintiff's and the FBI's investments in the Fund were not taxed. 26 U.S.C. § 402(a). Taxes on the FBI's contributions and earned interest would only become due upon distribution. 26 U.S.C. § 402(a).

If a federal employee covered by CSRS left government service, he previously had two options available to him: elect to receive a refund of his contributions to the CSRS under 5 U.S.C. § 8342, which would void his right to an annuity; or, elect to receive the basic or full annuity under 5 U.S.C. § 8336 and 5 U.S.C. § 8339. However, with the recent enactment of 5 U.S.C. § 8343a, the employee could choose to receive an alternative form of annuity consisting of a lump sum credit and payment of an annuity under 5 U.S.C. § 8343a(b).

In this case plaintiff chose not to receive the basic or full annuity (computed in accordance with 5 U.S.C. § 8339) or the basic annuity and a survivor annuity (under 5 U.S.C. 8341(b)(1) and computed under 5 U.S.C. §§ 8339 and 8341(b)(1)). Rather, plaintiff chose the "alternative form of annuity" described in 5 U.S.C. § 8343a(b). He made his election on August 3, 1987 and received a lump-sum distribution from the Fund of $53,382.77, less withheld income taxes. The taxability of the "alternative form of annuity," specifically the lump-

sum payment of $53,382.77 provided for in 5 U.S.C. § 8343a(b), is the issue.[4]

Annuity payments made under the "alternative form of annuity" are computed in accordance with Office of Personnel Management (OPM) Regulation 5 C.F.R. § 831.2205.[5] That Regulation, in effect, reduces the annuity payments that a retiree would otherwise have received based upon the present value of the lump-sum payment had he elected the full annuity option. Defendant contends that under this OPM Regulation, which is designed to comply with 5 U.S.C. § 8343a(c)[6], the lump-sum payment is treated as an accelerated payment of amounts

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[4] Plaintiff did not have available as an option the "lump sum credit" described in 5 U.S.C. § 8336, since he did not leave federal employment prior to meeting the requirements of 5 U.S.C. § 8336. Assuming that he could have made such an election and had done so, he would have lost all annuity rights based upon his service and forfeited all matching Government contributions to the Fund. But under 5 U.S.C. § 8343a no such forfeiture occurs.

[5] 831.2205—*Computation of alternative form of annuity.*—

(a) To compute the beginning rate of annuity payable to a retiree who elects an alternative form of annuity, OPM will first compute the monthly rate of annuity otherwise payable under subchapter III of chapter 83 of Title 5, United States Code, including all reductions provided under the subchapter other than those in § 8343a. *That monthly rate is then reduced by an amount equal to the retiree's lump-sum credit divided by the present value factor for the retiree's attained age* (in full years) *at the time of retirement.* The reduced monthly rate is then rounded to the next lowest dollar and becomes the rate of annuity payable.

(Emphasis added.)

[6] 5 U.S.C. § 8343a(c) provides:

Each alternative provided for under subsection (b) shall, to the extent practicable, be designed such that the present value of the benefits provided under such alternative (including any lump-sum credit) is actuarially equivalent to the present value of the annuity which would otherwise be provided the employee or Member of this subchapter, as computed under subsections (a)-(i) and (n) of section 8339 of this title.

that would otherwise be distributed to the retiree over the expected duration of the CSRS annuity.

Plaintiff's retirement was effective December 1, 1986. His first payment under the full annuity option (with a reduction to provide for a survivor annuity for his wife) was due April 1, 1987. In a letter dated May 11, 1987, OPM notified plaintiff that he had two annuity options available to him—he could elect either a regular annuity or an alternative annuity—but if he elected the alternative annuity, he would receive a reduced annuity and, that "you will also receive a refund of all of your retirement contributions." In a second letter from OPM dated May 11, 1987, plaintiff was advised that his lump-sum "credit" for income tax purposes was $53,382.77, and that this amount consisted solely of his contributions to the CSRS.

On June 6, 1987, plaintiff elected to receive the alternative form of annuity provided for under 5 U.S.C. § 8343a(b). On August 3, 1987, he received from the Fund a lump-sum distribution of $53,382.77, less withheld income taxes. A reduction of $199 in his monthly CSRS annuity was made to reflect the lump-sum payment.

Plaintiff requested the IRS to issue a private letter ruling explaining the federal income tax consequences of the payments he received from the Fund. The IRS, in two separate letters dated December 4, 1987, advised plaintiff that only 4.1 percent of the CSRS annuity payments and only 5.9 percent of the lump-sum distribution were excludable from gross income.

Plaintiffs filed their 1987 federal income tax return in accordance with the IRS' guidelines. They also reported that they were liable for a 10 percent early withdrawal penalty even though the IRS failed to mention the applicability of this penalty in its letter rulings. In June, 1988, plaintiffs filed a claim for refund, Form 1040X, seeking a refund of $17,784.30 plus all interest allowable by law based upon the position that payment of the

$53,382.77 was a nontaxable return of previously taxed contributions and that the 10 percent penalty was not applicable. The IRS denied this refund claim in a letter dated September 19, 1988. Thereafter, plaintiffs initiated this suit.

Contentions of the Parties

The parties agree that plaintiffs are entitled to recover all of Mr. Shimota's previously taxed contributions to the CSRS tax-free. Their disagreement is over the timing of plaintiffs' tax-free recovery of these contributions. Plaintiffs contend that the payment of $53,382.77 was a "lump-sum credit" and a nontaxable return of capital. Thus, if this position is correct, all annuity payments received thereafter are fully taxable.

Plaintiffs claim their position is supported by "a fundamental principle" of federal income taxation that an individual is taxed only on accretions to wealth and not on a return of capital. They rely upon *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 98 (1936); *Burnet v. Logan*, 283 U.S. 404, 413 (1931); *Commissioner v. Meyer*, 139 F.2d 256, 259 (6th Cir. 1943); and Treasury Regulation § 1.72-1(a). Treasury Regulation § 1.72-1(a) states:

> In general, these rules provide that amounts subject to section 72 are includable in the gross income of the recipient *except to the extent they are considered to represent a reduction or return of premiums or other considerations paid.* (Emphasis added.)

Thus, plaintiffs maintain that if the payment is determined to be a return of their contributions to the CSRS, the tax result is that the lump-sum distribution is a tax-free return of capital.

Plaintiffs contend that the court should focus on the statutory definition of the term "lump-sum credit," which is not defined in the IRC, to determine the nature of the payment. That definition, as found in 5 U.S.C. § 8331(8), is "the unrefunded amount consisting of[:]"

(i) retirement deductions made from the basic pay of an employee or Member;

(ii) amounts deposited by an employee or Member covering earlier service, including any amounts deposited under section 8334(j) of this title; and

(iii) interest on the deductions and deposits at 4 percent a year to December 31, 1947, and 3 percent a year thereafter compounded annually to December 31, 1956, or in the case of an employee or Member separated or transferred to a position in which he does not continue subject to this subchapter before he has completed 5 years of civilian service, to the date of separation or transfer . . . .

Subparagraphs (i) and (ii) obviously include only the employee's after-tax contributions.

Plaintiffs note that the OPM specifically advised plaintiff that "You will also receive a refund of all of your retirement contributions." Plaintiffs further point out that their lump-sum distribution for income tax purposes was $53,382.77, that this amount consisted entirely of after-tax contributions to the Fund, that the IRS has no authority unilaterally to "recharacterize" the applicable statutory definition found in the CSRS, and that historically the definition of "lump-sum credit" has remained consistent since Pub. L. 89-554 was passed in 1966 amending 5 U.S.C. § 8331(8). Also plaintiffs argue that in 1986, in establishing the Federal Employees Retirement System (FERS), Congress left this definition intact expressing its intent to approve this tax free treatment. Further, they state that the IRS' rulings (prior to 1986) have consistently held that the lump-sum credit is nontaxable to the extent of the taxpayer's contribution.

Next, plaintiffs argue that 5 U.S.C. § 8343a(b)(1), in using the word "and" in specification of the option to

elect a lump-sum credit "*and* payment of an annuity," (emphasis added) signifies a Congressional intent to separate the payment from the reduced annuity.[7] Therefore, plaintiffs conclude that the use of this conjunctive in the statute, along with the applicable OPM regulations, 5 C.F.R. § 831.2204—which provide that an eligible employee "may elect to receive the lump-sum credit *plus* an annuity" (emphasis added)—and the FERS Committee print prepared by the Congressional Research Service which discusses the nature of the property rights conferred on CSRS participants in a manner indicating a difference in the treatment to be accorded the payment and the annuity, means the lump-sum credit is "not received under an annuity, but in addition to it."

Further, plaintiffs contend that even if the payment was received "as an annuity" it was *noncontractual* in nature based upon the FERS Committee Print's description, page 95, of the nature of the pension, a statement in the Print that contractual annuity principles do not apply, and the Print's references to various cases supporting this view. Thus, plaintiffs conclude that since § 72(e) only applies to contractual annuities, the lump-sum distribution is not subject to that provision.

Plaintiffs dispute defendant's position that Treasury Regulation § 1.72-11(f) applies. Plaintiffs argue that since the payment in dispute is not received under an annuity contract, that Regulation is inapplicable since it only applies to "commercial annuity contracts," and it has never been cited as the basis for "any position." However, plaintiffs argue that even if IRS Reg. § 1.72-11(f) is applicable, it cannot be used to redefine the

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[7] 5 U.S.C. § 8343a(b)(1) provides as follows:

an alternative which provides for—

(A) payment of the lump-sum credit to the employee or Member; and

(B) payment of an annuity to the employee or Member for life; . . .

statutory definition of the term "lump-sum credit," since this would be a nullity under the holding in *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

Plaintiffs argue further that defendant fails to consider the historical differences between private and government plans. Plaintiffs contend that Congress has recognized the distinction between the CSRS and a private sector qualified plan and that courts have long recognized consistently that the CSRS is not contractual. Plaintiffs state that the legislative history of 5 U.S.C. § 8343a supports their construction of the non-taxability of the lump-sum credit. In their reply brief, they contend that an affidavit of James Cowen relating to the passage of the Tax Reform Act of 1986 shows that, in including 5 U.S.C. § 8343a as a part of FERS, Congress intended to make the lump-sum distribution tax free.

Also, plaintiffs contend that the penalty prescribed by § 72(t), which was enacted as a part of the Tax Reform Act of 1986, is inapplicable because the payment is a non-taxable return of capital. But, if it is determined that the payment is taxable, plaintiffs argue that since § 72(t), coupled with § 4974(c),[8] was meant to apply only to tax favored retirement arrangements, and since the CSRS is not such an arrangement, § 72(t) does not apply. Further, plaintiffs contend application of the § 72(t) "penalty" to the CSRS lump-sum payment is improper because the CSRS is not a "qualified plan" as described in § 401(a), a position they urge is supported by the legislative history of the Employee Retirement Income Security Act of 1974 (ERISA) and FERS as reported in H. Rep. No. 93-533, H. Rep. No. 807, and S. Rep. No. 166.

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[8] § 4974(c) defines a "qualified retirement plan" to include ". . . a plan described in Code § 401(a) which includes a trust exempt from tax under Code § 501(a)." § 4974(c) was also added to the Code by the Tax Reform Act of 1986.

Defendant contends § 402(a) governs the taxability of the lump-sum distribution to plaintiff and requires that it be taxed under § 72. § 402(a) provides, in part:

> SEC. 402. TAXABILITY OF BENEFICIARY OF EMPLOYEES' TRUST.
>
> (a) *Taxability of Beneficiary of Exempt Trust.*—
>
> (1) *General rule.*—Except as provided in paragraph (4),[9] the amount actually distributed to any distributee by any employees' trust described in section 401(a) which is exempt from tax under section 501(a) shall be taxable to him, in the year in which so distributed, under section 72 (relating to annuities).

Defendant's argument is that because § 402(a) does not distinguish between distributions that are income and those that are return of capital, although there was such a distinction made prior to the 1942 amendments to the Code,[10] the rules governing annuity contracts in § 72 apply to the plaintiff's distribution. Defendant argues that in enacting § 165(b), Congress intended that the retiree be taxed upon the amount received by him to the same extent as he would be taxed upon an annuity purchased by him. Defendant contends that this treatment has been continued in the 1954 and 1986 amendments to the Code.

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[9] In 1988, a technical correction to Section 402(a)(1) removed a reference to former Section 402(a)(2). See § 1101A(b)(8)(A), Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342. Section 402(a)(2) was repealed by the Tax Reform Act of 1986.

[10] Under the 1939 Code § 165(b) which had its origin in the 1921 Code § 219(f), distributions from the Fund were taxable to the retiree only after the amount received exceeded the retiree's contributions to the Fund. The 1942 Code § 162 changed the treatment of these distributions so that § 165(b) of the 1939 Code, as amended, provided that distributions from qualified pension plans would be taxed under the same provisions applicable to annuity contracts.

Defendant further contends that since 1952, the Fund has been consistently ruled to be a qualified "employees' trust described in § 401(a)" and therefore exempt from income tax under § 501(a). Thus, Congressional acquiescence can be imputed to the IRS' position that the Fund is a qualified trust because since 1952 applicable Treasury Regulations have been amended at least 16 times, § 72 has been amended at least 17 times, and there has been no change in the interpretation of § 401(a).

Defendant also argues that, even if the Fund is not an employees' trust described in § 401(a), the payment to plaintiff is taxable under § 402(b). Section 402(b) provides, in pertinent part:

> (a) *Taxability of beneficiary of nonexempt trust.*—
>
> (1) *In general.*—Contributions to an employees' trust made by an employer during a taxable year . . . for which the trust is not exempt from tax under § 501(a) . . . shall be taxable to him [employee] in the year in which so distributed or made available, under section 72 . . . .

Defendant contends that since both exempt and non-exempt trust distributions are taxed under § 72, it is immaterial whether the distribution is classified as exempt or non-exempt.[11]

Defendant asserts that § 72, which deals with payments received as annuities, generally provides that such payments will be treated as both the receipt of income and the return of "an aliquot portion" of the premium

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[11] Employer contributions to a non-exempt trust are includable in the gross income of the beneficiary in the year in which such contributions are made in accordance with § 83 of the 1986 Code. An employing agency's contributions to the CSRS Fund are not taxable to an employee until they are received. Defendant contends this indicates that the Fund is actually exempt from tax under § 401(a).

paid for it. Thus, under § 72, plaintiff can only exclude 4.1 percent of the monthly annuity payments he received from the Fund.[12]

Defendant contends that under § 72(e)(1) plaintiffs' lump-sum payment is an amount "not received as an annuity" and since it was "received on or after the annuity starting date," [13] § 72(e)(2)(A) requires that it be included in gross income.[14] Therefore, since § 72(e) covers all amounts not received as an annuity, it is also immaterial as to how the annuity contract characterizes a lump-sum payment whether as a dividend or a return of premium. Thus, whatever the characterization, the exclusion ratio of 4.1 percent, representing the annuitant's investment, needs no recalculation but remains the same.[15] Defendant contends that the lump-sum payment was received "after the annuity starting date" because plaintiff received his first distribution from the Fund on April 1, 1987 and his lump-sum payment on August 3, 1987. Moreover, defendant argues under the holding in *Price v. United States*, 459 F. Supp. 362, 365 (D. Md. 1978), § 72(e) governs and the payment (subject to the exclu-

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[12] See § 72(a), (b), and (c). The entire annuity payment is included in gross income and then the proportion of each annuity payment which the annuitant's investment in the annuity contract bears to his total expected return therefrom is excluded from income. The computation required for calculating the annual exclusion from income is as follows:

$$\frac{\text{Consideration for contract}}{\text{Total expected return}} \times \text{Annuity}$$

This amount is subtracted from the annuity payment to arrive at the portion remaining in income.

[13] The "annuity starting date" is the "first day of the first period for which an amount is received as an annuity under the contract." § 72(c)(4), Code 1986.

[14] The specific amount to be included in plaintiffs' gross income is not at issue.

[15] § 72(a) and (b).

sion) is taxable in the year it was received by plaintiff as ordinary income.

Defendant next disputes plaintiffs' position that the lump-sum payment and the annuity payments are "separate and distinct" on the ground that that position is unsupported by tax law and the CSRS statute. It argues that Regulation §§ 1.72-2(a)(3)(i) and (ii) make it clear that the two forms of distribution are interrelated benefits received under the same annuity contract for purposes of § 72—first, because Congress defined the lump-sum option as an "alternative form of annuity" and included both forms in their establishment by 5 U.S.C. § 8343a(c) and, second, because the OPM under 5 C.F.R. § 831.2205 calculates the annuity to be received under 5 U.S.C. § 8343a by treating the lump-sum payment as an accelerated distribution of annuity payments.

Defendant next argues that while the IRS has changed its position regarding the taxability of the lump-sum credit, it has always maintained that distributions from the Fund are taxable under § 72. Further, Defendant argues that there is a significant difference between the tax treatment of the lump-sum credit received under 5 U.S.C. § 8342 and the lump-sum distribution to plaintiffs under 5 U.S.C. § 8343a stemming from the fact that receipt of the lump-sum credit fully discharges all annuity rights while receipt of the lump-sum payment does not.[16] Taxability of the lump sum payment is not governed by § 72(e)(5) but by § 72(e)(2).

Defendant argues that although under § 72(d), which existed prior to 1986, the three annual lump-sum payments described in § 72(d) to employees were not includable in the employee's gross income, the repeal by Con-

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[16] Receipt of the lump-sum credit permits the employee to only include in gross income the difference, if any, between the amount received and the amount invested. That difference might be interest payable to employees who have not been employed for more than five years. § 72(e)(5); 5 C.F.R. § 831.105(b)(3).

gress of § 72(d) with the passage of the Tax Reform Act of 1986 removed this favorable treatment accorded such payments because of the inequity it represented to annuitants.[17] Further, defendant states that even if plaintiffs are correct in asserting that plaintiff's lump-sum payment is described as a "refund" under the CSRS statute, simply the "characterization" of the benefit as a "refund" in that statute is not controlling for tax purposes, since the CSRS statute is not a tax statute.

Finally, defendant contends plaintiffs are liable for the 10 percent additional tax imposed by § 72(t) because § 72(t)(1) applies the additional tax to *any* amounts received from a "qualified retirement plan" which, because the Secretary has ruled that the Fund is such a plan described in § 401(a), covers distributions from the Fund.[18] Moreover, defendant asserts Congress specifically excluded from the additional tax amounts received from state and local government pension plans thereby suggesting that had Congress wished to exclude application of § 72(t) to CSRS participants it could have easily done so in a similar fashion—i.e., by the addition of another exclusion in § 72(t)(2).

Standard of Review

Summary judgment is appropriate if there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law. RUSCC 56. Judgment is entered on cross-motions for summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to

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[17] S. Rep. No. 313, 99th Cong. 2d Sess. 609 *reprinted in*, 1986-3 C.B. (Vol. 3) at 609.

[18] Although there are six exceptions to application of the 10 percent additional tax which are set forth in § 72(t)(2), plaintiffs do not argue that any of these apply to them. Plaintiffs' argument is simply that § 72(t) is inapplicable because the CSRS is not a qualified retirement plan "and that § 72(t) does not apply to CSRS participants."

that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In this case, the court agrees with the parties that there are no genuine issues of material fact in dispute and that this case is appropriate for resolution by summary judgment.

DISCUSSION

Plaintiffs seek an exemption from a tax which the Commissioner of the IRS has imposed.[19] It is axiomatic that exemptions from taxation [are not] granted by implication. *Harding Hospital, Inc. v. United States*, 505 F.2d 1068, 1071 (6th Cir. 1974); *see Founding Church of Scientology v. United States*, 188 Ct. Cl. 490 (1969); *Puritan Lawn Memorial Park Cemetery v. United States*, 15 Cl. Ct. 234 (1988). To be sure, a statute creating an income tax exemption must be strictly construed with any doubts to be resolved in favor of the taxing entity. *Harding Hospital, Inc. v. United States*, 505 F.2d 1068, 1071 (6th Cir. 1974). Furthermore, determinations of the Commissioner are presumptively correct. *Welch v. Helvering*, 290 U.S. 111, 115 (1933); *Morowitz v. United States*, 15 Cl. Ct. 621, 629 (1988). Plaintiff bears the burden of producing "substantial evidence" as to the wrongfulness of the Commissioner's decision. *KFOX, Inc. v. United States*, 206 Ct. Cl. 143, 151 (1975). With these principals in mind, the court will now turn to an analysis of the specific issues in this case.

After a careful analysis of the parties' arguments and a review of the applicable statutes and regulations at issue, the court finds that the lump sum distribution to plaintiff under 5 U.S.C. § 8343a is taxed under IRC § 402 and IRC § 72. Section 402(a) of the IRC clearly states

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[19] Plaintiffs argue that the general rule that returns of capital are tax free should apply. However, this opinion demonstrates that the IRC has specifically provided that the lump sum payment shall be taxed under IRC § 72.

that "the amount actually distributed to any distributee by any employees' trust described in Section 401(a) which is exempt from tax under Section 501(a) *shall* be taxable to him, in the year in which so distributed, under section 72 (relating to annuities)." (Emphasis added.) The court finds that these statutes convey a plain meaning and are not ambiguous.

While the court makes its holding under the plain meaning rule of statutory construction, the court's conclusion is supported by the predecessor to § 402(a) which was § 165(b) of the IRC of 1939 which had its beginnings in § 219(f) of the Internal Revenue Act of 1921.[20] Under the old section 219(f), distributions to the distributee were taxed only after the full amount of the distributee's contributions were distributed to him. However, this tax treatment was changed when § 165(b) of the IRC of 1939 was enacted,[21] so that distributions from qualified pension

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[20] Old section 219(f) provided:

> (f) A trust created by an employer as a part of a stock bonus or profit-sharing plan for the exclusive benefit of some or all of his employees, to which contributions are made by such employer, or employees, or both for the purpose of distributing to such employees the earnings and principal of the fund accumulated by the trust in accordance with such plan, shall not be taxable under this section, but the amount actually distributed or made available to any distributee shall be taxable to him in the year in which so distributed or made available to the extent that it exceeds the amounts paid in by him.

[21] Section 165(b) provided:

> (b) *Taxability of Beneficiary.*—The amount actually distributed or made available to any distributee by any such trust shall be taxable to him, in the year in which so distributed or made available, under section 22(b)(2) as if it were an annuity the consideration for which is the amount contributed by the employee, except that if the total distributions payable with respect to any employee are paid to the distributee on account of the employee's separation from the service, the amount of such distribution to the extent exceeding the amount contributed by the employee, shall be

plans were taxed the same as annuity contracts. Furthermore, contrary to plaintiffs' argument that the lump sum distribution is a tax free return of capital, § 402(a) of the IRC of 1954 does not distinguish between distributions that are income and distributions which are allegedly a return of capital; it simply directs that distributions shall be taxed under § 72.

However, the Fund is an employees' trust described in § 401(a) of the IRC. This is evident from the specific exception identified in § 402(a)(1) and the legislative history of § 402(a).[22] The first clause of § 402(a)(1) states "[e]xcept as provided in paragraph (4), . . ." Section 402(a)(4) provides:

> (4) *Distributions by United States to nonresident aliens.*—The amount includible under paragraph (1) of this subsection in the gross income of a nonresident alien individual with respect to a distribution made by the United States in respect of services performed by an employee of the United States shall not exceed an amount which bears the same ratio to the amount includible in

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considered a gain from the sale or exchange of a capital asset held for more than 6 months.

As defendant correctly points out in its cross-motion for summary judgment, section 22(b)(2) of the IRC of 1939 requires that distributees include in gross income annuity payments to the extent of 3% of the amount contributed to the annuity. Distributions beyond that amount were deemed a return of capital and were not taxed until the total amount exceeded the investment in the plan.

[22] The court finds that the statutes at issue convey plain meaning, and therefore, resort to legislative history is unnecessary. *Ocean Drilling & Exploration Co. v. United States*, 220 Ct. Cl. 395 (1979); *J.H. Miles & Co. v. United States*, 3 Cl. Ct. 10 (1983). Of course, merely because the statutes have plain meaning does not preclude an analysis of legislative history. *Ocean Drilling & Exploration Co. v. United States*, 220 Ct. Cl. 395 (1979). The purpose of examining the legislative history in this opinion is to show that, even if the statutes are viewed as ambiguous, the court's conclusions are nevertheless supported by the legislative history.

gross income without regard to this paragraph as—

(A) the aggregate basic pay paid by the United States to such employee for such services, reduced by the amount of such basic pay which was not includible in gross income by reason of being from sources without the United States, bears to

(B) the aggregate basic pay paid by the United States to such employee for such services.

In the case of distributions under the civil service retirement laws, the term "basic pay" shall have the meaning provided in section 8331(3) of Title 5, United States Code.

This special rule for the taxation of distributions from the Fund to nonresident aliens would be superfluous if the Fund were not an employees' trust described in § 401(a). A statute should never be read so as to render certain provisions superfluous. *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981). Moreover, defendant correctly cites the legislative history of § 402(a)(4) for the proposition that "[u]nder present law civil service annuities and certain other retirement benefits provided by the United States *are treated as distributed under 'qualified' pension plans*, and when distributions are made to the annuitant he is not taxed on the portion of the payment representing his own contributions to the pension." S. Rep. No. 1028, 86th Cong., 2d Sess. 1, *reprinted in*, 1960-1 C.B. 822. As a qualified employees' trust, the Fund does not need to meet all of the requirements that private plans must meet, but they are to be *treated* as if they do. The reason that governmental plans do not have to comply with all of the restrictions applicable to private plans is that governments are not subject to taxation and, therefore, do not require similar controls. Thus, the beneficiaries of governmental plans

are to be treated the same as private plan beneficiaries whose distributions are taxable under § 402(a).

Regulation § 1.72-2(a)(3)(iii) expressly states that "Section 72 shall be applied to distributions received under the Civil Service Retirement Act." Section 72 has been amended at least 17 times since its enactment without change. Under these circumstances, the court is persuaded that Congress has acquiesced in the IRS' interpretation respecting the nature of the Fund. *Helvering v. Winmill*, 305 U.S. 79, 83 (1938); *United States v. Correll*, 389 U.S. 299, 305-06 (1967); *First Nat. Bank v. United States*, 214 Ct. Cl. 585, 593 (1977). The court finds that the Fund is a qualified trust described in § 401(a) of the Code which is exempt from tax under § 501(a) of the Code, and that distributions from the Fund including lump-sum distributions are taxable under §§ 402(a) and 72 of the Code.[23]

Although plaintiffs charge that since passage of the Tax Reform Act of 1986 defendant has failed to issue definitive regulations specifying that the Fund is a qualified plan described in § 401(a), this fact is not sufficient to prove plaintiffs' contention that the Fund is not a qualified plan under that section. Since 1921, the IRS has held that distributions from the Fund are taxable under § 501(a).[24] This interpretation has been incorporated in the Regulations since 1960 and although amended at least 16 times since their promulgation, no change has been made in this consistent interpretation.[25]

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[23] The tax treatment of the "lump-sum credit" as defined in the CSRS is uncontested.

[24] *See* T.D. 3112, 4 C.B. 76; *see* Rev. Rul. 74-136, 1974-1 C.B. 29; Rev. Rul. 68. 486, 1968-2 C.B. 184; Rev. Rul. 58-472, 1958-2 C.B. 30, 32; I.T. 4102, 1052-2 C.B. 173.

[25] *See* Treas. Reg. §§ 1.72-2(a)(3)(iii), 1.72-2(a)(3)(iv) Ex. 4, Treasury Regulations on Income Tax (26 C.F.R.); T.D. 6497, 1960-2 C.B. 19.

Even if the Fund is not an employees' trust described in § 401(a) and therefore § 402(a) does not apply, § 402(b) would require that the lump sum distribution be taxed under § 72. Section 402(b) provides:

> (b) *Taxability of beneficiary of nonexempt trust.*—
>
> (1) *In general.*—
>
> Contributions to an employees' trust made by an employer during a taxable year of the employer which ends within or with a taxable year of the trust from which the trust is not exempt from tax under section 501(a) shall be included in the gross income of the employee in accordance with section 83 (relating to property transferred in connection with performance of services), except that the value of the employees' interest in the trust shall be substituted for the fair market value of the property for purposes of applying such section. *The amount actually distributed or made available to any distributee by any such trust shall be taxable to him in the year in which so distributed or made available, under section 72 (relating to annuities)*, except that distributions of income of such trust before the annuity starting date (as defined in section 72 (c)(4)) shall be included in the gross income of the employee without regard to section 72 (e)(5) (relating to amount not received as annuities). (Emphasis added.)

This section clearly mandates that the amount distributed to any distributee "by *any such trust shall* be taxable . . . under section 72 (relating to annuities)." (Emphasis added.) Therefore, even if the Fund is not an employees' trust described in § 401(a), the distribution at issue in this case because of § 402(b) would be taxed under § 72.

As a result, the lump sum distribution made to plaintiff is taxable under § 72 of the IRC.[26] Section 72 provides for the taxation of any amounts received under annuity contracts. These same rules apply to Fund distributions pursuant to § 402(a). There is no dispute about the annuity portion of plaintiff's distribution. It is taxed under §§ 72(a), (b) and (c) which provide that each annuity payment will be treated as both the receipt of income and the return of an "aliquot" portion of the premium paid for it. *Garvey, Inc. v. United States*, 1 Cl. Ct. 108, 125 (1983), *aff'd*, 726 F.2d 1569 (Fed. Cir.), *cert. denied*, 469 U.S. 823 (1984).[27]

Section 72 provides for the taxation of amounts "not received as an annuity" under annuity contracts.[28] If an amount is received on or after the starting date of the annuity which is the first day of the first period for which an amount is received as an annuity, it is includable in gross income. *See* §§ 72(e)(2)(A) and 72(c)(4).

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[26] Regulation § 1.72-2(a)(3)(iii) states that section 72 shall apply to distributions received under the CSRS.

[27] Pursuant to §§ 72(a) and (b) the entire annuity payment is included in gross income and then the proportion of each annuity payment which the annuitant's investment in the annuity contract bears to the total expected return therefrom is excluded from income. Under explicit rules in these sections, regardless of the characterization of the amount received, plaintiff may only exclude 4.1 percent of the monthly annuity payments he receives from the Fund.

[28] 72(e)(1) provides:

(e) *Amounts Not Received as Annuities.*—

(1) *Application of subsection.*—

(A) *In general.*—This subsection shall apply to any amount which—

(i) is received under an annuity, endowment, or life insurance contract, and

(ii) is not received as an annuity,

if no provision of this subtitle (other than this subsection) applies with respect to such amount.

Plaintiffs' contention that § 72(e) does not apply is without merit. In addition to the language in § 402(a)—and alternatively § 402(b)—which establishes that § 72 applies to all distributions from the Fund, courts have consistently held CSRS retirement program payments for income tax purposes are to be treated as amounts received "under an annuity, endowment or life insurance contract." *Miller v. Commissioner*, 144 F.2d 287 (4th Cir. 1944); *Heard v. Commissioner*, 40 T.C. 7, 11-13 (1963), *aff'd*, 326 F.2d 962 (8th Cir.), *cert. denied*, 377 U.S. 978 (1964); *Taylor v. Commissioner*, 2 T.C. 267, 271 (1943).

The lump-sum payment at issue is an "amount not received as an annuity" because it is received in the form of a one-time payment to which § 72 applies pursuant to § 402(a). See Regulations § 1.72-2(b)(2). Clearly, §§ 72(a) through (c) do not apply because as the Regulations expressly state, those sections only cover amounts which are payable at *regular intervals* over a period of more than one full year from the date on which they are deemed to begin, provided the total of the amounts so payable or the period for which they are to be paid can be determined as of that date.[29] There is no provision in § 72 other than § 72(e) which logically can apply to plaintiffs' lump-sum distribution. The payments covered by § 72(e) includes all amounts "not received as an annuity, including dividends, or payments in the nature of dividends or as a return of premiums. Thus, § 72(e) is an all inclusive "catch all" for all payments that are non-annuity payments, in which event the IRC directs application of § 72.

In *Price v. United States*, 459 F. Supp. 362, 365 (D. Md. 1978), the court held that the refund a retired teacher

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[29] Thus, the amounts plaintiffs receive as annuities are subject to the capital recovery rules in §§ 72(a) and (b) and require no recalculations of the 4.1 percent exclusion ratio to reflect the lump-sum payment.

received of her excess contributions to a state retirement fund was taxable as ordinary income. In agreeing with the Government's position that the refund was fully taxable in the year it was received, the court held:

> . . . even though the payment to plaintiff . . . was the return of excess contributions, it is clearly taxable under § 72(e) and the applicable Treasury Regulations as ordinary income.
>
> *Price v. United States*, 459 F. Supp. 362, 365 (D. Md. 1978).

In *Price* the court reasoned that the legislative history of § 72(e) indicated that Congress had adopted the approach in § 72 of permitting the exclusion ratio to remain constant while treating as taxable income "extraordinary payments." *Price v. United States*, 459 F. Supp. 362, 365 (D. Md. 1978). Plaintiff's lump-sum distribution is a similar extraordinary payment and under the *Price* rationale is properly treated as taxable income even though the *Price* case involved a different "Fund." Plaintiff received his first distribution from the CSRS Fund on April 1, 1987 and his lump-sum payment on August 3, 1987 or well after the annuity starting date. This fact supports defendant's contention that the lump-sum payment was not received as an annuity but under an annuity contract and is includable in gross income. While the *Price* case is not controlling authority, it provides persuasive precedent for the proposition that § 72(e) governs the taxation of this lump-sum payment.

Plaintiffs argue that the lump-sum payment is "separate and distinct" from the annuity payments and that the distribution is not received under an "annuity contract." However, the two forms of payment are received under the same annuity contract. § 1.72-2(a)(3)(i) provides in pertinent part:

> (3)(i) Sections 402 and 403 provide that certain distributions by employees' trusts and certain

> payments under employee plans are taxable under section 72 . . . . For purposes of applying section 72 to such distributions and payments (other than those described in subdivision (iii) of this subparagraph), each separate program of the employer consisting of interrelated contributions and benefits shall be considered a single contract. Therefore, all distributions or payments (other than those described in subdivision (iii) of this subparagraph) which are attributable to a separate program of interrelated contributions and benefits are considered as received under a single contract.

Further, Section 1.72-2(a)(3)(iii) sets forth the treatment of distributions from employees' trusts other than the Fund. This regulation provides that "Section 72 shall be applied to distributions received under the Civil Service Retirement Act in the manner prescribed in subdivision (i) of this subparagraph."

Further, under 5 U.S.C. § 8343a the interrelated nature of the two forms of benefit is apparent. That section provides that the alternative form of annuity—"including any lump-sum credit"—should be actuarially equal to the annuity that would otherwise be provided. Thus both components of the alternative form of annuity are necessarily interdependent since they must be equivalent to the basic CSRS annuity. Further, OPM Regulations buttress this correlation by treating the 5 U.S.C. § 8343a annuity as an accelerated distribution of annuity payments that would otherwise be paid to the retiree over the expected duration of the CSRS annuity. See 5 C.F.R. § 831.2205.

Moreover, there is a highly significant difference between the tax treatment of the lump-sum distribution made to plaintiffs and the "lump-sum credit." Plaintiffs' lump-sum distribution arises under 5 U.S.C. § 8343a,

which permits the continued receipt of an annuity, while the lump-sum credit arises under § 8342, which terminates that right completely.[30] Thus, under 5 U.S.C. § 8342, § 72(e)(5) applies and the employee only includes in gross income the difference between the amount received and the amount invested (which in the case of the lump-sum credit might be interest on the employee's contribution).[31] However, since there is no full surrender of the annuity under 5 U.S.C. § 8343a—it is only reduced by the actuarial value of the lump-sum payment—§ 72(e)(5) does not apply. Accordingly, the taxability of this lump-sum payment is governed by § 72(e)(2).

Plaintiff contends that the use of the language "lump sum credit" *and* payment of an annuity for life indicates Congressional intent to treat the two items as separate and distinct distributions and therefore they do not fall under a single "annuity contract." Plaintiffs contend this argument is supported by the OPM letter to plaintiffs which uses the conjunctive "plus." The court, however, does not agree with that interpretation. 5 U.S.C. § 8343a(b)(1) defines "alternative form of annuity" as "payment of the credit . . .; and payment of an annuity to the employee . . . for life." This section simply means that the alternative form of annuity is a single package, or single annuity contract for purposes of § 402(a) and § 72, which includes two parts: a lump sum distribution and a reduced annuity for life.[32]

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[30] § 72(e)(5), which provides that for certain distributions from trusts described in § 401(a), the amount included in gross income is only the amount by which the payment exceeds the investment in the contract. Whether the payment is issued as a refund, surrender, redemption or maturity, it fully discharges all contractual obligations. *See* § 72(e)(5)(E).

[31] Under OPM regulations, an employee electing the lump-sum credit under 5 U.S.C. § 8342 who has not been employed for more than five years is entitled to interest on his contributions to the Fund. 5 C.F.R. § 831.105(b)(3).

[32] Plaintiffs' analysis of 5 U.S.C. § 8343a(b)(1) is flawed. In arguing that the lump-sum payment is not part of the "alternative

Further, the conclusion that the "alternative form of annuity" is not simply a reduced annuity as plaintiffs contend but consists of both of these payment items, is supported by the clear Congressional intent to design an alternative form of annuity which is actuarially equivalent to the present value of the full annuity which would otherwise be paid. To achieve this goal, of necessity, the lump-sum payment is an integral part of the computation. Finally, as pointed out by defendant, use of the word "form" in the phrase, would be superfluous if the intent was to refer only to the reduced annuity because it is simply an annuity to begin with.

In these circumstances, the court concludes that the plain language of § 8343a does not support plaintiffs' position that the lump-sum payment is not part of the "alternative form of annuity." It clearly is an integral part of that annuity which cannot be disregarded in determining the total amount each retiree is due in the aggregate to receive under CSRS.

Plaintiffs argue that the general rule is that a return of capital is tax free. However, where Congress, in clear language, has specifically described, as it has in § 72, how and when investments in annuity contracts are to be deemed recovered, that general rule does not apply. *Garvey Inc. v. United States*, 1 Cl. Ct. 108, 124 (1983), *aff'd*, 726 F.2d 1569 (Fed. Cir.), *cert. denied*, 469 U.S. 823 (1984). Rather, the general rule that the courts are to give statutes their plain meaning applies. *Ocean Drilling & Exploration Co. v. United States*, 220 Ct. Cl. 395 (1979). To hold in accordance with the plaintiffs' contention that the lump-sum payment is simply a return of capital would require the court to totally ignore the

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form of annuity" defined in that section and therefore its taxation is not governed by § 72, plaintiff has misread the plain language of the section. 5 U.S.C. § 8343a(b)(1) defines the "alternative form of annuity" as two payment items—the lump-sum credit *plus* the annuity—and not just the annuity alone.

provisions of §§ 402(a) and 72 which together establish a comprehensive and logical scheme for taxation of all distributions from the Fund. This court, however, cannot ignore §§ 402(a) and 72 or carve out an exception for plaintiffs' benefit.

The nature of the Fund is that it is an employee's trust and not a contract. Since this is so, § 402 provides that distributions therefrom are taxed *in the same manner* as annuity contracts, regardless of whether the distributions are classed as income or return of capital. Furthermore, the trust is an exempt trust described in § 401(a) which is exempt from tax under § 501(a), but it makes no different whether the trust is classed as an exempt trust or non-exempt trust. In either case the lump-sum payment is taxable under §§ 72 and 402(a) or 402(b). There is no clear exception in the statutes which would exempt the lump-sum payment from taxation under those IRS code sections. Whether or not the annuitant actually recoups his entire investment is immaterial. *Garvey Inc. v. United States*, 1 Cl. Ct. 108, 123 (1983), *aff'd*, 726 F.2d 1569 (Fed. Cir.), *cert. denied*, 469 U.S. 823 (1984). Section 72 makes it clear that Congress favored predictability of tax liability over precision in determining gain.

Section 72(e)(5)(E) defines a return of capital as payment that is in full discharge of an obligation to pay an annuity. But under the lump-sum option exercised by plaintiff, his right to an annuity is not discharged. To characterize the payment as a return of capital is inaccurate. Moreover, such characterization cannot displace the application of §§ 72 and 402 to the lump-sum payment. As previously noted, the lump-sum payment is treated as an accelerated payment of amounts that would otherwise be distributed to the retiree over the expected duration of the CSRS annuity. 5 U.S.C. § 8343a(c) and 5 C.F.R. § 831.2205(a).

Finally, the repeal by Congress of § 72(d) helps to illuminate Congressional intent with respect to the tax

treatment to be accorded the lump-sum payment. Section 72(d), which allowed employees to exclude from gross income their entire investment in retirement annuities during the first three years of the annuity was repealed by the 99th Congress shortly after it created the lump-sum payment option in the Federal Employees' Retirement System Act of 1986 because "[t]he three-year basis recovery rule provides favorable tax treatment to a limited class of taxpayers, which is inequitable to other taxpayers." S. Rep. No. 313, 99th Cong. 2d Sess. 609, *reprinted in*, 1986-3 C.B. (Vol. 3) at 609.

This court cannot accept that the same Congress which repealed the tax favored treatment given to certain employees under § 72(d) because of its concern with the inequality inherent in the *three* year recovery statute as to other annuitants, could have intended to create a mechanism whereby civil servants could exclude from gross income their entire investment in the Fund in the *first* year of the annuity. Moreover, there is no express statutory direction from Congress similar to that applicable to distributions to non-resident aliens. *See* § 402(a)(4). The absence of such a direction supports defendant's argument that Congress did not intend to provide a tax favored haven for plaintiff or other retirees in his status in creating the lump-sum option in the 1986 Act.

In summary, the court does not view the lump-sum payment plaintiff received as simply a "refund" of plaintiff's contributions under the CSRS statute as plaintiffs contend, but as an accelerated distribution of amounts that would otherwise be paid as part of an annuity payment under a rather comprehensive and integrated system

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[33] The terminology used in the CSRS in describing the benefit as a "refund" is not necessarily controlling particularly since the CSRS is not a taxing statute. *See, e.g., Aetna Life Insurance Co. v. United States*, 16 Cl. Ct. 364, 374 (1989).

which prefers no one group of annuitants over others.[33] Furthermore, there can be no serious question that if plaintiff had received the lump-sum payment from a private employer whether from a qualified or a non-qualified plan, § 72 would have been applicable and controlling over the language of the benefit statutes in Title 5.

In their reply filed February 2, 1990, plaintiffs included the affidavit of James Cowen, who states he served as Minority Special and Chief Counsel to the Subcommittee on Civil Service, Post Office and General Services Committee on Governmental Affairs, U.S. Senate, (subcommittee) from April, 1978 to June, 1986, to support their contention that the 1986 FERS legislation intended that the lump-sum distribution would not be taxable. Mr. Cowen alleges that the updated memorandum that he wrote to Senator Ted Stevens (R. Ark.), a copy of which was attached to his affidavit, was actually written in early 1986 when the Tax Reform Act of 1986 was being considered on the Senate floor and that its purpose was to avoid the tax proration that would accrue under the provisions of pending legislation. According to Mr. Cowen pursuant to Senator Stevens instructions he discussed the matter with Representative Ford to whom he attributes the "brilliant" idea of the proposed tax change in order to make the entire lump-sum distribution non-taxable. His memorandum in the pertinent paragraph concludes by stating that "We planned to keep this quiet until passage because of the fear of the tax committee blocking us."

Defendant contends that Mr. Cowen's affidavit is entitled to no weight. We agree. First, as previously discussed, § 402 is not ambiguous. On its face it is all encompassing and directs that the lump-sum distribution is taxable under § 72 of the IRC. Therefore the court need not resort to legislative history in an effort to determine the meaning of § 402. Second, the memorandum relates

to 5 U.S.C. § 8343a and not to § 402. There is no language in § 8343a which specifically provides for the taxation of the lump-sum payment. The memorandum shows that apparently Senator Stevens after reading the memorandum wrote "see me" in response. There is no indication, however, that Senator Stevens or any other Congressman agreed with the thoughts expressed in the memorandum. Even if Mr. Cowen's statements are accurate, this court has determined to give them no weight. *Selman v. United States*, 204 Ct. Cl. 675, 685 n. 6 (1974); *National School of Aeronautics, Inc. v. United States*, 135 Ct. Cl. 343, 351 (1956). Even if Senator Stevens and Representative Ford had submitted affidavits similar to Mr. Cowen's affidavit in support of plaintiff's position respecting their interpretation of the relevant statutory provisions, we would not be required to accord them any weight. *Selman v. United States*, 204 Ct. Cl. 675, 685 n. 6 (1974); *National School of Aeronautics, Inc. v. United States*, 135 Ct. Cl. 343, 351 (1956).[34]

In these circumstances the court finds that plaintiffs have failed to show a Congressional intent to provide an

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[34] An additional reason exists, however, for giving little or no weight to Mr. Cowen's affidavit. It appears from the face of the attached memorandum that Mr. Cowen's views, even if shared by Senator Stevens and Representative Ford, were not widely disseminated among other members of Congress, but kept secret to avoid controversy over the change being proposed. In other words, it is apparent from the memorandum that it was feared that if Congress had fully understood that an attempt was being made to maintain the purported tax exempt treatment for the lump-sum distribution the legislation could have encountered tax committee opposition. This would impliedly indicate that the tax committee in Congress, at least if advised of the secret strategy, might have been much opposed to a tax free distribution of the lump-sum payment particularly in view of the immediate negative effect upon much needed tax revenues. Perhaps this secret strategy partially accounts for the fact that the Cowen Memorandum was never made part of the official legislative history of either the Tax Reform Act of 1986 or the Federal Employees' Retirement Act of 1986.

exception to the unambiguous rule set forth in § 402.[35] *See Lutheran Mutual Life Ins. Co. v. United States*, 221 Ct. Cl. 77, 82 (1979), *cert. denied*, 446 U.S. 936 (1980). *Hart v. United States*, 218 Ct. Cl. 212, 222 (1978); *Aparacor, Inc. v. United States*, 215 Ct. Cl. 596, 605 (1978).

The Additional Tax Imposed by § 72(t)

Section 72(t)(1) provides for a 10 percent additional tax to any amounts received from a "qualified retirement plan." Section 72(t)(1) provides:

> (t) *10-Percent Additional Tax on Early Distributions From Qualified Retirement Plans.*—
>
> (1) *Imposition of additional tax.*—If any taxpayer receives any amount from a qualified retirement plan (as defined in Section 4974(c)), the taxpayer's tax under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent of the portion of such amount which is includible in gross income.

That term, as defined in § 4974(c)(1), is a "plan described in § 401(a) which includes a trust exempt from tax under § 501(a)" and a "plan" which the Secretary at any time has determined to be such a plan. As previously noted, the IRS has since 1952 ruled that the Fund is a qualified trust under § 401(a) of the Code and exempt from income tax under § 501(a). See Rev. Rul. 74-136, 1974-1 C.B. 29; Rev. Rul. 68-486, 1968-2 C.B. 184; Rev. Rule 58-472, 1958-2 C.B. 30, 32; I.T. 4102, 1952-2 C.B. 173. This interpretation has been incorporated into the applicable Treasury Regulations. Further-

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[35] The comments in the Cowen Memorandum also relate to enactment of 5 U.S.C. § 8343a, which is not a taxing statute.

more, the court's prior analysis has shown that the Fund is a "qualified plan" described in § 401(a).[36]

Section 72(t)(2) provides six detailed exceptions to application of the additional tax. None of these exceptions applies to the case *sub judice*. The court is persuaded that under the doctrine of *expressio unius est exclusio alterius*, the absence of any additional exception from § 72(t)(2) is persuasive evidence that Congress did not intend to permit early lump-sum distributions from the Fund to escape the additional tax. *National Maritime Union v. United States*, 231 Ct. Cl. 59, 72 (1982). Congress could easily have included with these six exceptions in § 72(t)(2) another exception to application of the additional tax, had it meant for early lump-sum distributions from the Fund to escape the additional 10 percent tax. The fact that the computation of the alternative form of annuity is executed as if the lump-sum distribution was an early distribution of annuity payments which would otherwise be due supports the conclusion that the payment at issue is such an "early" distribution.

Further, § 72(t)(1) refers to a "qualified retirement plan (as defined in section 4974(c))." This specific reference in § 72(t)(1) strongly suggests that Congress wished to except from the added tax amounts received

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[36] Plaintiffs contend that the Fund is not a qualified plan described in IRC § 401(a). Plaintiffs rely principally upon the changes implemented by ERISA and an analysis of Code Subchapter D as a whole. The court is unconvinced by plaintiffs' arguments on this issue, and for the reasons stated in this opinion, will hold that the Fund is a plan "described in" § 401(a). Further, contrary to plaintiffs' contention, the CSRS is, in certain ways, a "tax favored" retirement arrangement. Under § 402(a) the employing agency's contributions to the Fund are not taxed to the employee when made. If it were not such an arrangement, the agency's contributions to the Fund would be taxable under § 402(b), and in accordance with § 83, when made to the Fund.

from state and local government pension plans.[37] This conclusion is also supported by the legislative history of § 72(t)(1) which referred to non-application of the tax to amounts distributed from unfunded deferred compensation plans of tax exempt or State or local government employees (§ 457 plans).[38]

Notwithstanding the fact that the Fund is a plan described in § 401(a), further support for the position that § 72(t) applies is found in the language of § 4974(c)(1) which refers to "any plan, contract, account, or annuity, which, at any time, has been determined by the Secretary to be such a plan, contract, account, or annuity." As defendant correctly points out, Treasury Regulations §§ 1.72-2(a)(3)(iii) and 1.72-2(a)(3)(iv) hold that § 72 shall be applied to distributions received under the CSRS.

CONCLUSION

For the reasons stated in this opinion, the court finds that plaintiffs have failed to meet their burden of showing through substantial evidence that the Commissioner's assessment of the tax and penalty was erroneous. Thus, the court finds that the lump-sum distribution to plaintiffs is taxable under §§ 402 and 72 of the IRC and is not a tax free return of capital. Moreover, since the Fund is a qualified plan described in § 401(a) of the IRC, the additional 10 percent tax imposed by § 72(t) applies. Accordingly, plaintiffs' motion for summary judgment is denied and defendant's cross-motion for

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[37] Section 4974(c) distinguishes between "qualified pensions plans" and "eligible deferred compensation plans." The latter is provided for under § 457(b) which applies only to deferred compensation plans of state and local governments and tax-exempt organizations.

[38] H.R. Cong. Rep. No. 841, 99th Cong., 2d Sess. II-455, *reprinted in* 1986-3 C.B. (Vol. 4) at II-455.

summary judgment is granted.[39] The Clerk is directed to dismiss plaintiffs' complaint. No costs.

IT IS SO ORDERED.

/s/ Wilkes C. Robinson
WILKES C. ROBINSON,
Judge

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[39] Due to the press coverage given this case, the court is indeed mindful of the effect that this decision, should it become final, may have upon the many CSRS retirees who have availed themselves of the alternative form of annuity and have received or will receive lump-sum payments and reduced annuities. However, it must be remembered that it is not this or any other court's responsibility to judicially legislate a change in the applicable statutes and regulations to avoid what some might regard as an unjust result. Under our constitutional form of government, directing such a fundamental change in our tax laws, particularly when that change would have an immediate and highly negative impact upon the budget, is clearly the sole province of the United States Congress. Obviously, plaintiffs and all others aggrieved by this decision are free to seek appropriate legislative relief from the Congress.

IN THE UNITED STATES CLAIMS COURT

No. 106-89 T

JOHN E. SHIMOTA AND
NAN B. SHIMOTA

v.

THE UNITED STATES

JUDGMENT

[Filed Sep. 11, 1990]

Pursuant to the opinion of September 10, 1990, denying plaintiffs' motion for summary judgment and granting defendant's cross-motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

FRANK T. PEARTREE
Clerk of Court

By: /s/ Linda A. Eddin
Deputy Clerk

September 11, 1990

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Filing fee is $105.00

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-5017

JOHN E. SHIMOTA AND
NAN B. SHIMOTA,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

ORDER

[Filed Nov. 6, 1991]

Before ARCHER, Circuit Judge, COWEN, Senior Circuit Judge, and MAYER, Circuit Judge.

A petition for rehearing having been filed in this case, and a response thereto having been invited by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on November 13, 1991.

FOR THE COURT,

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: November 6, 1991

cc: THOMAS J. O'ROURKE
GARY R. ALLEN

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-5017

JOHN E. SHIMOTA AND
NAN B. SHIMOTA,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

ORDER

[Filed Nov. 20, 1991]

A suggestion for rehearing in banc having been filed in this case, and a response thereto having been invited by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT,

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: November 20, 1991

cc: THOMAS J. O'ROURKE
GARY R. ALLEN

APPENDIX E

5 U.S.C. § 8343a. Alternative forms of annuities

(a) The Office of Personnel Management shall prescribe regulations under which an employee or Member may, at the time of retiring under this subchapter (other than under section 8337 of this title), elect annuity benefits under this section instead of any other benefits under this subchapter (including any benefits under section 8341 of this title) based on the service of the employee or Member.

(b) Subject to subsection (c), the Office shall by regulation provide for such alternative forms of annuities as the Office considers appropriate, except that among the alternatives offered shall be—

(1) an alternative which provides for—

(A) payment of the lump-sum credit to the employee or Member; and

(B) payment of an annuity to the employee or Member for life; . . .

5 U.S.C. § 8331—Definitions

(8) "lump-sum credit" means the unrefunded amount consisting of—

(A) retirement deductions made from the basic pay of an employee of Member;

(B) amounts deposited by an employee or Member covering earlier service, including any amounts deposited under section 8334(j) of this title; and

(C) interest on the deductions and deposits at 4 percent a year to December 31, 1947, and 3 percent a year thereafter compounded annually to December 31, 1956, or, in the case of an employee

or Member separated or transferred to a position in which he does not continue subject to this subchapter before he has completed 5 years of civilian service, to the date of the separation or transfer;

but does not include interest—

(i) if the service covered thereby aggregates 1 year or less; or

(ii) for the fractional part of a month in the total service; . . .

26 U.S.C. § 72(d)

TREATMENT OF EMPLOYEE CONTRIBUTIONS UNDER DEFINED CONTRIBUTION PLANS AS SEPARATE CONTRACTS.—For purposes of this section, employee contributions (and any income allocable thereto) under a defined contribution plan may be treated as a separate contract.

26 U.S.C. § 72(e)

AMOUNTS NOT RECEIVED AS ANNUITIES.—

(2) GENERAL RULE.—Any amount to which this subsection applies—

(A) if received on or after the annuity starting date, shall be included in gross income, or

(B) if received before the annuity starting date—

(i) shall be included in gross income to the extent allocable to income on the contract, and

(ii) shall not be included in gross income to the extent allocable to the investment in the contract. . .

(5) RETENTION OF EXISTING RULES IN CERTAIN CASES.—

(E) FULL REFUNDS, SURRENDERS, REDEMPTIONS, AND MATURITIES.—This paragraph shall apply to—

(i) any amount received, whether in a single sum or otherwise, under a contract in full discharge of the obligation under the contract which is in the nature of a refund of the consideration paid for the contract, and

(ii) any amount received under a contract on its complete surrender, redemption, or maturity.

In the case of any amount to which the preceding sentence applies, the rule of paragraph (2)(A) shall not apply.

26 U.S.C. § 414(k)

CERTAIN PLANS.—A defined benefit plan which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant shall—

(1) for purposes of section 410 (relating to minimum participation standards), be treated as a defined contribution plan,

(2) for purposes of sections 72(d) (relating to treatment of employee contributions as separate contract) 411(a)(7)(A) (relating to minimum vesting standards), 415 (relating to limitations on benefits and contributions under qualified plans), and 401(m) (relating to nondiscrimination tests for matching requirements and employee contributions), be treated as consisting of a defined contribution plan to the extent benefits are based on the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

26 C.F.R. § 1.72-2(a)(3)(i)

> Sections 402 and 403 provide that certain distributions by employees' trusts and certain payments under employee plans are taxable under section 72 . . . For purposes of applying section 72 to such distributions and payments (other than those described in subdivision (iii) of this subparagraph), each separate program of the employer consisting of interrelated contributions and benefits shall be considered a single contract.

(2)

No. 91-1241

Supreme Court, U.S.
FILED
MAR 30 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN E. SHIMOTA AND NAN B. SHIMOTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
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QUESTION PRESENTED

Whether the lump-sum payment petitioner received from the Civil Service Retirement and Disability Fund pursuant to his election of an "alternative form[] of annuity" under 5 U.S.C. 8343a was taxable under Section 72(e) of the Internal Revenue Code.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1241

JOHN E. SHIMOTA AND NAN B. SHIMOTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-2a) is reported at 943 F.2d 1312. The opinion of the Claims Court (Pet. App. 3a-36a) is reported at 21 Cl. Ct. 510.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1991. A petition for rehearing was denied on November 6, 1991 (Pet. App. 38a). A suggestion for rehearing en banc was declined on November 20, 1991 (Pet. App. 39a). The petition for a writ of certiorari was filed on January 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner John E. Shimota [1] was a federal employee who participated in the Civil Service Retirement System (CSRS) and made contributions to the Civil Service Retirement and Disability Fund (the Fund). Petitioner retired in November 1986. His total contributions to the Fund were $53,382.77. Pet. App. 4a-5a.

On April 1, 1987, petitioner began receiving payments under the basic CSRS annuity provided in 5 U.S.C. 8336, 8339. On June 6, 1987, however, he made an election to receive the "alternative form[] of annuity" provided in 5 U.S.C. 8343a. Section 8343a allows a retiree to elect to receive a lump-sum payment of an amount equal to his contributions to the Fund, together with a reduced annuity. On August 3, 1987, petitioner received his lump-sum payment in the amount of $53,382.77, less withheld income taxes. His monthly CSRS annuity was reduced by $199 in order to reflect the lump-sum payment. Pet. App. 7a.

The IRS advised petitioner that 5.9% of the lump-sum payment was excludible from his gross income. Petitioner filed his 1987 income tax return in accordance with the IRS's advice, reporting as income all but 5.9% of the lump-sum payment. In June 1988, however, petitioner filed a claim for refund of the amount of tax paid with respect to the lump-sum payment, based on the position that no part of the payment was includible in his gross income. The IRS denied the refund claim and petitioner brought this refund action in the Claims Court. Pet. App. 7a-8a.

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[1] Petitioner Nan B. Shimota is a party solely by virtue of having filed a joint income tax return with her husband for the year in issue.

2. The Claims Court rejected petitioner's argument (Pet. App. 3a-36a). The court agreed with the government that Sections 402 and 72 of the Internal Revenue Code (Code or I.R.C.) (26 U.S.C.) governed the tax treatment of the lump-sum payment (Pet. App. 17a-22a). Section 402(a)(1) provides that the amount distributed to a distributee by an employees' trust described in Section 401(a) "shall be taxable to him, in the year in which so distributed, under section 72 (relating to annuities)." The court concluded that the Fund is an employees' trust described in Section 401(a) and that, accordingly, the lump-sum payment was taxable under Section 72 (Pet. App. 19a-21a). The court further observed that "[e]ven if the Fund is not an employees' trust described in § 401(a) and therefore § 402(a) does not apply, § 402(b) would require that the lump sum distribution be taxed under § 72" (*id.* at 22a).

Turning to Section 72, the Claims Court observed that Section 72(e) sets forth rules governing the taxation of any amount received under an annuity contract that is "not received as an annuity" (Pet. App. 23a-24a). The court concluded that "[t]he lump-sum payment at issue is an 'amount not received as an annuity' because it is received in the form of a one-time payment" (*id.* at 24a). Section 72(e)(2)(A) generally provides that such an amount that is "received on or after the annuity starting date, shall be included in gross income." The court concluded that the lump-sum payment received by petitioner fell within this provision and, accordingly, that it was includible in his gross income (Pet. App. 23a-25a). The court also re-jected petitioner's argument that his lump-sum payment could not be taxed under Section 72 because it represented a "return of capital," observing that Section 402(a)(1) "does not distinguish between

distributions that are income and distributions which are allegedly a return of capital; it simply directs that distributions shall be taxed under § 72" (Pet. App. 19a).[2]

The court of appeals affirmed (Pet. App. 1a-2a). The court concluded that petitioner's arguments "were fully considered and the issues correctly decided in [the Claims Court's] thorough and well-reasoned opinion" (*id.* at 2a). Accordingly, the court of appeals "adopt[ed] that opinion and affirm[ed] the Claims Court's judgment" (*ibid.*). The court of appeals also observed (*ibid.*) that the Tax Court, in *Guilzon* v. *Commissioner*, 97 T.C. 237 (1991), had agreed with the Claims Court that a lump-sum payment received under 5 U.S.C. 8343a was taxable under Section 72(e) of the Internal Revenue Code.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The issue in this case concerns the income tax treatment of a lump-sum payment received by petitioner from the Civil Service Retirement and Disability Fund (the Fund) pursuant to his election of an "alternative form[] of annuity" under 5 U.S.C. 8343a.[3] The Fund consists of contributions made by

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[2] The Claims Court also held that the lump-sum payment was subject to the ten-percent additional tax imposed by Section 72(t) of the Internal Revenue Code (Pet. App. 33a-35a). Petitioner does not challenge that holding in his petition.

[3] Contrary to the impression petitioner seeks to create, this case does not involve the question whether an employee is entitled to recover his contributions to the Fund tax-free, nor is there any issue of double taxation. As the Claims Court pointed out (Pet. App. 8a), an employee's contribution to the Fund will

federal employees and the government, together with earnings on these amounts. See 5 U.S.C. 8348. Congress has designated the Fund as a trust fund. 31 U.S.C. 1321(88). Employing agencies are required to deduct and withhold a specified amount of each employee's salary and also to contribute to the Fund an equal amount from the appropriation or fund used to pay the employee's salary. 5 U.S.C. 8334(a)(1). Amounts withheld from the employee's salary are taxable in the year in which the withholding is made. See *Hogan* v. *United States*, 513 F.2d 170, 175 (6th Cir.), cert. denied, 423 U.S. 836 (1975). Amounts contributed by the employing agency are not taxed to the employee until distribution. See I.R.C. § 402(a)(l); Treas. Reg. § 1.402(a)-1(a)(1)(i).

When an employee meets the eligibility requirements set forth in 5 U.S.C. 8336, he is entitled to retire and receive an immediate annuity computed under 5 U.S.C. 8339. An individual who leaves federal employment prior to meeting those requirements can elect to receive a "lump-sum credit" under 5 U.S.C. 8342(a). The "lump-sum credit" is an amount consisting of the amounts previously withheld from the employee's pay, amounts (if any) deposited by the employee covering earlier service, and (in some

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be recovered tax-free under the government's position as well as under petitioner's position. The difference between the positions of the parties is simply one of timing. Under petitioner's approach, he would be entitled to recover his contributions to the Fund tax-free up front, with all payments in excess of the amount of his contributions fully taxable. Under Section 72, however, which we maintain governs the tax treatment of petitioner's lump-sum payment, petitioner will recover his contributions to the Fund tax-free over the term of his annuity, with a portion of each annuity payment being excludible from tax and the remaining portion subject to tax.

circumstances) interest on those amounts. 5 U.S.C. 8331(8). The employee's receipt of the lump-sum credit "voids all annuity rights" under CSRS. 5 U.S.C. 8342(a).

In 1986, Congress enacted 5 U.S.C. 8343a, which gave employees who retired after June 5, 1986, and met the requirements of 5 U.S.C. 8336, an election to receive "alternative forms of annuities" instead of the basic annuity computed under Section 8339. The "alternative form[] of annuity" elected by petitioner has two components: payment of the lump-sum credit (as defined in 5 U.S.C. 8331(8)); and payment of an annuity. 5 U.S.C. 8343a(b). The lump-sum payment that is part of this alternative annuity under Section 8343a differs from the lump-sum credit described in Section 8342 in that receipt of the former, unlike the latter, does not void an employee's right to receive an annuity. [4] Congress provided in Section 8343a(c) that the alternative annuity "shall, to the extent practicable, be designed such that the present value of the benefits provided under such alternative (including any lump-sum credit) is actuarially equivalent to the present value of the annuity which would otherwise be provided the employee," as computed under Section 8339. The annuity payments provided under the "alternative form[] of annuity" are computed in accordance with Office of Personnel Management (OPM) regulations. OPM first computes the monthly rate of annuity that would otherwise be payable to the

[4] The amount of the "lump-sum credit" is the same under both Sections 8342 and 8343a. There are, however, material differences between the distributions under the two Sections. To avoid confusion, we will refer to the payment under Section 8342 as the "lump-sum credit" and the payment under Section 8343a as the "lump-sum payment."

retiree; "[t]hat monthly rate is then reduced by an amount equal to the retiree's lump-sum credit divided by the present value factor for the retiree's attained age (in full years) at the time of retirement"; and the reduced monthly rate "becomes the rate of annuity payable." 5 C.F.R. 831.2205(a). The regulation, in effect, reduces the annuity payments that otherwise would have been paid to the retiree by amounts whose present value is equal to the lump-sum payment.

Section 402 of the Internal Revenue Code sets forth the rules governing the taxability of beneficiaries of employees' trusts. Section 402(a)(1) provides that amounts distributed by a "qualified" employees' trust described in Section 401(a) of the Code are taxable to the distributee "under section 72 (relating to annuities)." See H.R. Rep. No. 2333, 77th Cong., 2d Sess. 104 (1942). The Claims Court concluded that the Fund is a qualified employees' trust described in Section 401(a) (Pet. App. 19a-21a).[5] Although petitioner argued in the Claims Court and the court of appeals that the Fund was not "qualified" under Section 401(a) (see Pet. App. 11a, 21a), he does not make that argument in his petition. Accordingly, any amount distributed by the Fund, including the payment in issue here, is taxable under Section 72 of the Code.

Section 72 provides specific rules for determining the tax treatment of amounts received under "an annuity, endowment, or life insurance contract."

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[5] See Rev. Rul. 74-138, 1974-1 C.B. 29, 30 (the Fund is a qualified trust under Section 401(a)); Rev. Rul. 70-150, 1970-1 C.B. 106 (same); Rev. Rul. 68-486, 1968-2 C.B. 184, 185 (same); Rev. Rul. 58-472, 1958-2 C.B. 30, 32 (same); I.T. 4102, 1952-2 C.B. 173, 174 (same); see also Treas. Reg. § 1.72-2(a)(3)(iii) ("Section 72 shall be applied to distributions received under the Civil Service Retirement Act.").

These rules generally provide that amounts received under such a contract (and, by virtue of Section 402(a)(1), amounts distributed by a qualified employees' trust) are includible in the gross income of the recipient, except to the extent that they are considered to represent a return of premiums or other consideration paid. Treas. Reg. § 1.72-1(a). A payment that is "received as an annuity" is taxed under Section 72(a) and (b), which generally provides that each annuity payment will be treated as both the receipt of income and the return of an aliquot portion of the premiums or other consideration paid for the annuity contract. Thus, pursuant to Section 72(a) and (b), "[t]he entire annuity payment is included in gross income and then the proportion of each annuity payment which the annuitant's investment in the annuity contract bears to his total expected return therefrom is excluded from income." *Garvey, Inc.* v. *United States*, 1 Cl. Ct. 108, 120 (1983), aff'd, 726 F.2d 1569 (Fed. Cir.), cert. denied, 469 U.S. 823 (1984).

Section 72 also contemplates the receipt of amounts that are "received under an annuity * * * contract" but are "not received as an annuity" (I.R.C. § 72(e)(l)(A)), and Section 72(e) provides rules governing the taxation of such amounts. The regulations explain the difference between an amount "received as an annuity" and an amount "not received as an annuity." Treasury Regulations § 1.72-1(b) states that " 'amounts received as an annuity' are amounts which are payable at regular intervals over a period of more than one full year from the date on which they are deemed to begin, provided the total of the amounts so payable or the period for which they are to be paid can be determined as of that date." The regulation further provides that "[a]ny other amounts to which the provisions of section 72 apply are considered to be

'amounts not received as an annuity.' " See also Treas. Reg. §§ 1.72-2(b)(2), 1.72-11(a)(l). The rules of Section 72(e) thus apply to any non-annuity payment that is received under an annuity contract, such as dividends, payments in the nature of dividends, and payments that represent a return of premiums paid or other consideration. See *Price* v. *United States*, 459 F. Supp. 362, 364-365 (D. Md. 1978) (return of excess contributions to state retirement fund taxable under Section 72(e)). Since Section 72 applies to any amount distributed by an employees' trust, Section 72(e) applies to any distribution by an employees' trust that is not an annuity payment.

As the Claims Court observed (Pet. App. 24a), since the lump-sum payment was a one-time payment, it did not constitute "amounts which are payable at regular intervals over a period of more than one full year" (Treas. Reg. § 1.72-1(b)). Since Section 72 applies to the payment (by reason of Section 402(a)(1)), Section 72(e) applies to determine the tax treatment of the payment, as the Claims Court correctly held (Pet. App. 24a-28a).

Section 72(e)(2)(A) provides that an amount to which Section 72(e) applies that is "received on or after the annuity starting date, shall be included in gross income." The "annuity starting date" is "the first day of the first period for which an amount is received as an annuity under the contract." I.R.C. § 72(c)(4). Petitioner received his first annuity payment from the Fund on April 1, 1987, and received his lump-sum payment on August 3, 1987 (Pet. App. 7a). Since the lump-sum payment was received after the annuity starting date, it is included in gross income pursuant to Section 72(e)(2)(A), as the Claims Court (Pet. App.

23a-24a) and the court of appeals (*id.* at 2a) correctly held. Accord, *Guilzon* v. *Commissioner*, 97 T.C. 237 (1991).

2. In an effort to avoid the clear rule of Section 72(e)(2)(A), petitioner argues that application of Sections 72(d) and 414(k) of the Code indicate that his lump-sum payment and his annuity payments were received under "separate contracts" (Pet. 9-17). Petitioner did not raise this argument in the Claims Court and did not raise it in his opening brief in the court of appeals. Indeed, he cited neither Section 72(d) nor Section 414(k) in that brief. He raised the argument for the first time in his appellate reply brief. Arguments not presented in the trial court generally should not be considered for the first time on appeal. *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). Moreover, arguments can not be raised for the first time in a reply brief. *Miller* v. *Fairchild Indus. Inc.*, 797 F.2d 727, 738 (9th Cir. 1986); see *Kaufman Co.* v. *Lantech, Inc.*, 807 F.2d 970, 973 n.* (Fed. Cir. 1986). The court of appeals did not address the argument, and this Court should therefore decline to consider it. In any event, petitioner's argument lacks merit.

Section 1122(c)(3)(A) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2468, added Section 72(e)(9) to the Code, which provided: "Any employee contributions (and any income allocable thereto) under a defined contribution plan shall be treated as a separate contract for purposes of [Section 72(e)]." 26 U.S.C. 72(e)(9) (Supp. IV 1986). Congress contemplated that, under this provision, "if an employee withdraws employee contributions from such a plan or account, then for tax purposes, the distribution will be considered to be part nontaxable, i.e., a return of employee contributions, and part taxable, i.e., a distribution of earnings on those contributions."

2 H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-462 (1986). In 1988, Congress made a technical correction to the 1986 Act by repealing Section 72(e)(9) and adding Section 72(d), which provides: "For purposes of [Section 72], employee contributions (and any income allocable thereto) under a defined contribution plan may be treated as a separate contract." Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1011A(b)(2), 102 Stat. 3472. See S. Rep. No. 445, 100th Cong., 2d Sess. 172-173 (1988).

The "separate contract" treatment of new Section 72(d) applies only to employee contributions "under a defined contribution plan." A "defined contribution plan" is "a plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." I.R.C. § 414(i). A "defined benefit plan" is "any plan which is not a defined contribution plan." I.R.C. § 414(j). Since the CSRS retirement program provides for benefits based on average pay and years of service (see 5 U.S.C. 8339), it is not a defined contribution plan, but, rather, is a defined benefit plan. Section 414(k) of the Code provides in part that, for purposes of Section 72(d), a defined benefit plan that has a component similar to a defined contribution plan will be treated as consisting of two plans:

> A defined benefit plan which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant shall * * * for purposes of section[] 72(d) * * * be treated as consisting of a defined contribution plan to the extent benefits

> are based on the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

Petitioner's assertion that Section 414(k) makes the rule of Section 72(d) applicable to distributions from the Fund (Pet. 10-13) is wrong for two reasons.

First, the Fund, contrary to petitioner's implication (Pet. 13), does not contain a "separate account" for each individual federal employee. Federal agencies merely are required to maintain "individual retirement records" reflecting the amount that each employee has contributed to the Fund. 5 U.S.C. 8334(f). Moreover, the "separate account of a participant" referred to in Section 414(k) is "a separate account to which actual earnings and losses are allocated." Notice 87-13, 1987-1 C.B. 432, 438 (Q & A 14).[6] Amounts distributed to employees by the Fund are in no way based upon any earnings and losses of the Fund, much less upon earnings and losses of any "separate account" of the employee. Accordingly, the lump-sum payment under 5 U.S.C. 8343a is not "a benefit * * * which is based partly on the balance of the separate account of a participant" within the meaning of Section 414(k).

Second, even if the lump-sum payment were viewed as a benefit based partly on the balance of the separate account of a participant, it would not be "a benefit derived from *employer* contributions" (I.R.C. § 414(k) (emphasis added)). If the lump-sum payment rep-

[6] For purposes of Section 414(k), the plan provisions regarding a participant's separate account must satisfy the requirements of a defined contribution plan under Section 414(i). Rev. Rul. 79-259, 1979-2 C.B. 197, 198. A separate account to which earnings and losses are allocated is the essence of a defined contribution plan.

resents the balance of a separate account of a participant, then, since the lump-sum payment is an amount equal to the employee's contributions to the Fund, the lump-sum payment would be a benefit derived from *employee* contributions. In short, Section 414(k) does not apply here, and the separate contract treatment of Section 72(d) is therefore inapplicable.

3. Petitioner observes that the IRS has ruled that receipt of the lump-sum credit under 5 U.S.C. 8342 is taxable only to the extent that the amount received exceeds the employee's contributions (Rev. Rul. 70-150, 1970-1 C.B. 106) and suggests that a lump-sum payment received under 5 U.S.C. 8343a should be treated in the same manner (Pet. 6-9). The Claims Court correctly recognized that there is a difference between the lump-sum credit under 5 U.S.C. 8342 and the lump-sum payment under 5 U.S.C. 8343a that results in different tax treatment under Section 72 of the Internal Revenue Code (Pet. App. 26a-27a).

Section 72(e)(5) provides that certain types of payments "not received as an annuity" are not subject to the rules of Section 72(e)(2); instead, "the amount shall be included in gross income, but only to the extent it exceeds the investment in the contract." One of those specified payments is "any amount received, whether in a single sum or otherwise, under a contract in full discharge of the obligation under the contract which is in the nature of a refund of the consideration paid for the contract." 26 U.S.C. 72(e)(5)(E)(i); see also Treas. Reg. § 1.72-11(c). The receipt of the lump-sum credit under Section 8342 terminates the right of the employee to receive a CSRS annuity. The lump-sum credit is thus received "in full discharge" of the employee's annuity rights. Under these circumstances, as the Claims Court

observed (Pet. App. 27a), "§ 72(e)(5) applies and the employee only includes in gross income the difference between the amount received and the amount invested (which in the case of the lump-sum credit might be interest on the employee's contribution)." See 5 U.S.C. 8331(8)(C) (circumstances in which lump-sum credit includes interest); 5 C.F.R. 831.105(b) (same).

The receipt of a lump-sum payment under Section 8343a, however, does not result in a full discharge of the employee's annuity rights, because the retiree is still entitled to receive a reduced annuity. Therefore, the Claims Court correctly concluded that Section 72(e)(5) does not apply here and that "the taxability of this lump-sum payment is governed by § 72(e)(2)" (Pet. App. 27a).

4. Petitioner contends that the legislative history of 5 U.S.C. 8343a shows that Congress intended that the Section 8343a lump-sum payment would be a tax-free distribution (Pet. 13-17). Petitioner points to nothing in the legislative history of the Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (the FERS Act), to support his contention. Section 8343a was enacted by Section 204(a) of the FERS Act, 100 Stat. 591-592. That provision was contained in neither the House nor the Senate version of the bill that became the FERS Act, but rather was added in conference. The Conference Report makes only passing references to the provision and offers no explanation of its purpose. H.R. Conf. Rep. No. 606, 99th Cong., 2d Sess. 149, 154 (1986).

Petitioner relies instead on the legislative history of other legislation enacted four years after the FERS Act, the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388. Section 7001(a) of that Act, 104 Stat. 1388-327 to 1388-328,

amended Section 8343a to suspend the alternative form of annuity election for employees retiring after November 30, 1990, and before October 1, 1995. See H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 975-976 (1990). One section of the House Budget Committee report on the Act presents the House Post Office and Civil Service Committee's views on the portions of the bill within its jurisdiction. H.R. Rep. No. 881, 101st Cong., 2d Sess. 169-195 (1990). It is this report on which petitioner relies (Pet. 15-16).

Since application of the Internal Revenue Code provisions governing the taxation of distributions from employees' trusts plainly indicates that a Section 8343a lump-sum payment is taxable under Section 72(e) of the Code, there is no need to turn to legislative history to determine whether Congress intended that such payments would be taxed. Courts are required to "assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982), quoting *Richards* v. *United States*, 369 U.S. 1, 9 (1962). The Conference Report on the FERS Act says nothing about the tax treatment of a lump-sum payment. According to petitioner, the 1990 House Report indicates that a lump-sum payment is tax-free. But a statement in a committee report "as to what the Committee believes an earlier statute meant" provides "an extremely hazardous basis for inferring the meaning of a congressional enactment." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980); see *Weinberger* v. *Rossi*, 456 U.S. 25, 35 (1982). Moreover, even apart from its status as post-enactment history, the report cited by petitioner hardly evidences a clearly expressed legislative intent that lump-sum payments are tax-free. The discussion of Section 8343a in the report

(H.R. Rep. No. 881, *supra*, at 170) is, at most, ambiguous with respect to whether the committee that prepared that report believed that a Section 8343a lump-sum payment would be tax-free. It is well settled that "exemptions from taxation are not to be implied; they must be unambiguously proved." *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 354 (1988). There is no statutory provision granting an exemption for petitioner's lump-sum payment, and the absence of such a provision hardly can be overcome by reliance on ambiguous language in a committee report written four years after the enactment of Section 8343a.

Petitioner also contends that the legislative history of the Tax Reform Act of 1986 indicates that Congress contemplated that the "separate contract" treatment of Section 72(d) would apply to the Section 8343a lump-sum payment (Pet. 16-17). Petitioner relies on statements made by Representative Rostenkowski, Chairman of the House Ways and Means Committee, in response to questions raised by Representative Ford, Chairman of the House Post Office and Civil Service Committee, with regard to the tax treatment of certain types of distributions from the Fund. 132 Cong. Rec. 26,207-26,208 (1986). Representative Rostenkowski stated, among other things, that (*ibid.*):

> if an existing employee makes an election to be covered under the new Federal employee retirement system or under the integrated offset system and the employee receives a refund of excess contributions paid onto [*sic*] the old civil service retirement system, the refunded contributions are also treated as part of a separate contract and, therefore, are treated as a nontaxable return of employee contributions.

Petitioner admits that Representative Rostenkowski's "comments did not relate to the lump-sum credit [under 5 U.S.C. 8343a]" (Pet. 17 n.23). Such comments with respect to a refund of "excess" contributions to an "existing" employee who elects to be covered under FERS hardly show that Congress intended that the lump-sum payment an employee can elect to receive upon retirement are to be treated as part of a separate contract.

5. Petitioner correctly observes (Pet. 4) that the question of the proper income tax treatment of a lump-sum payment received under 5 U.S.C. 8343a affects many federal retirees who have received such payments.[7] The only courts that have considered the question (the courts below and the Tax Court in *Guilzon*) have held that the payments are taxable under Section 72(e) of the Internal Revenue Code. There is thus no conflict among the courts of appeals nor other reason warranting further review.

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[7] As noted at page 14-15, *supra*, Section 7001(a) of the Omnibus Budget Reconciliation Act of 1990 amended Section 8343a to suspend the alternative form of annuity election for employees retiring after November 30, 1990, and before October 1, 1995. Federal employees retiring during that period cannot elect to receive the lump-sum payment under Section 8343a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1992

Supreme Court, U.S.
FILED
APR 10 1992
OFFICE OF THE CLERK

(3)

No. 91-1241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN E. SHIMOTA and NAN B. SHIMOTA,
Petitioners,

v.

THE UNITED STATES,
Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

Shimota v. United States, 943 F.2d 1312 (Fed. Cir. 1991)

Shimota v. United States, 21 Cl. Ct. 510 (1990)

PRELIMINARY STATEMENT

Respondent filed a Brief in Opposition to the Petition for Writ of Certiorari in the above-captioned matter on March 30, 1992. Respondent's Brief raises two matters that require reply. Specifically, Respondent characterizes the lower courts' opinion as thorough and well-reasoned, but offers no persuasive explanation for its reliance on a regulation that has been superceded by a subsequent statutory enact-

ment. (Respondent's Brief 4) Respondent further argues that certain arguments advanced by Petitioners were first raised on appeal. (Respondent's Brief 10)

This reply is submitted in accordance with Rule 15.6 of the Rules of the Supreme Court of the United States.

I. PETITIONERS PROPERLY ARGUED THAT THE STATUTORY SEPARATE CONTRACT DOCTRINE SUPERCEDED THE SINGLE CONTRACT DOCTRINE AND THE LOWER COURT ERRONEOUSLY FAILED TO ADDRESS THIS MATTER

Respondent asserted that this Court should deny the Petition because, in part, the lower courts' decisions were "thorough and well-reasoned." (Respondent's Brief 4) Respondent cited *Guilzon v. Commissioner*, 97 T.C. 237 (1991), *appeal docketed*, No. 92-4229 (5th Cir. March 9, 1992), a case in which the Tax Court considered an identical issue and adopted the Claims Court's[1] findings in the present case.

A key finding in the Claims Court's opinion was its conclusion that Reg. §1.72-2(a)(3)(i)[2] provided that all distributions or payments attributable to a separate program of interrelated contributions and benefits are considered as received under a single contract. Thus, it concluded that the lump sum payment and monthly annuity paid to John Shimota under the Civil Service Retirement System (CSRS) were from a single contract. This conclusion ignored the

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[1] Counsel for Petitioners in this matter also serve as counsel for the taxpayers in *Guilzon*.

[2] All references to "Reg." refer to the Treasury Regulations at 26 Code of Federal Regulations.

impact of the separate contract doctrine embodied in new Code § 72(d)[3], and amended Code § 414(k) on the issues in this case. Both of these provisions were added to the Tax Code by the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 ("Tax Reform Act of 1986") and the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 ("TAMRA").

While the Claims Court relied upon the reasons for repeal of the basis recovery rule of prior Code § 72(d)[4], it ignored the statutory provision which replaced it, the separate contract rule of the new Code § 72(d). The issues in this case cannot be properly resolved unless the relationship between the statutory separate contract doctrine of Code §§ 72(d) and 414(k) and the regulatory single contract doctrine of Reg. § 1.72-2(a)(3)(i) are examined and addressed. Neither the Claims Court nor the Federal Circuit has considered this matter. As a result of this glaring oversight, the lower courts' opinions can hardly be characterized as "thorough." Petitioners' position with respect to this matter is discussed in detail in its Petition at pages 9-17.

Respondent further asserts that Petitioners raised the "separate contract" argument for the first time

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[3] All references to "Code" or "Tax Code" refer to the Internal Revenue Code of 1986, as amended, 26 United States Code. New Code § 72(d) refers to the provision added in 1988 but made effective as of the date of enactment of the Internal Revenue Code of 1986.

[4] The basis recovery rule of prior Code § 72(d) was part of the Internal Revenue Code of 1954, as amended and was replaced by a new § 72(d) in the Tax Reform Act of 1986 and TAMRA.

in their Reply Brief filed with the Federal Circuit. (Respondent's Brief 10) A review of the initial motion for summary judgment in the Claims Court demonstrates that this contention is incorrect. Conversely, if the argument had been raised for the first time on appeal, the appellate court could have readily disposed of Petitioners' argument on that basis. It did not do so. Rather, it affirmed a decision based on a regulation which had not been revised to reflect subsequent statutory enactments.

Petitioners contend that, at a minimum, this Court should remand this matter to the Court of Appeals to address the impact of Code § 414 (k) and Code § 72(d) on the issues in this case. If the appellate court concludes that Petitioners' separate contract argument was raised for the first time on appeal, it will undoubtedly reject this argument. If it concludes that the argument was properly raised, however, it should be directed to examine the merits of the respective positions regarding the separate contract doctrine.

CONCLUSION

Based on the positions advanced in the Petition For Writ of Certiorari and in this Reply, Petitioners respectfully request that the Court grant a Writ of Certiorari. Alternatively, Petitioners respectfully request that the Court remand this matter to the Court of Appeals for the Federal Circuit with direction to address the impact of the separate contract doctrine on the issues in this case.

Respectfully submitted,

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